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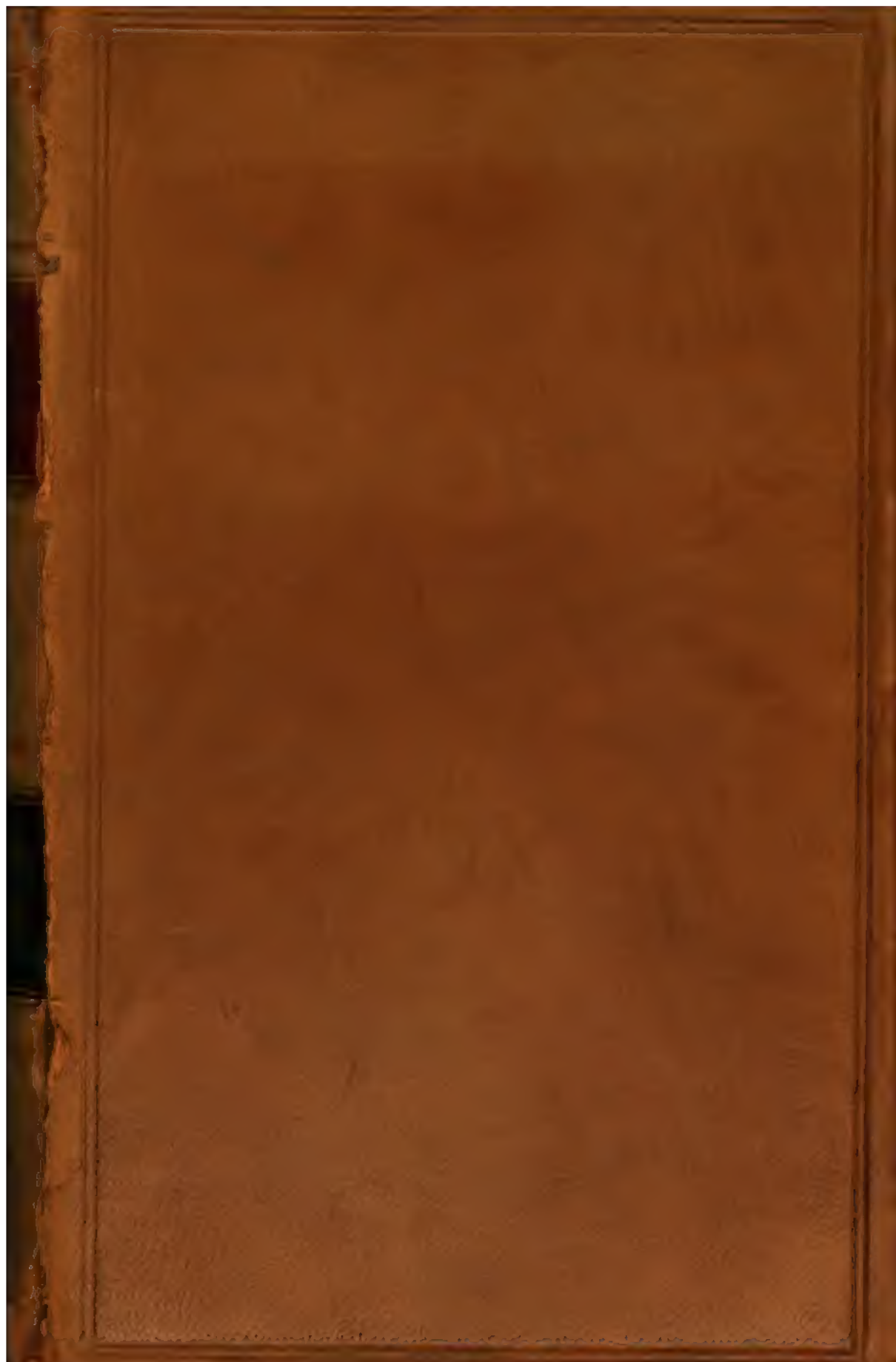
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AMERICAN AND ENGLISH
DECISIONS IN EQUITY.

BEING

**SELECT CASES DECIDED IN THE APPELLATE
COURTS OF AMERICA AND ENGLAND.**

**WITH NOTES REFERRING TO THE
PRINCIPAL MATTERS.**

ANNUAL.

FIRST SERIES. VOLUME III.

ANNOTATED BY

ARDEMUS STEWART,
OF THE PHILADELPHIA BAR.

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AMERICAN AND ENGLISH DECISIONS IN EQUITY.

Bill of Review—When Maintainable—Newly-discovered Evidence—Partition—Implied Warranty.

DINGESS ET AL. v. MARCUM ET AL.

(Supreme Court of Appeals of West Virginia. March 28, 1896.)

(41 W. Va. 757; 24 S. E. Rep. 624.)

It is necessary that a final decree should have been rendered in the cause which is sought to be reviewed, before a bill to review the same will be entertained.

The causes for which a bill of review may be entertained are limited as follows: (1) There must be error in law apparent on the face of the decree; or (2) the party seeking to review the decree must allege and prove the discovery of new matter, which could not have been used at the time of making the decree, in consequence of the party's ignorance that such matter existed.

The matter relied on must not only be new, but it must be such as the party, by the use of reasonable diligence, could not have known.

In partition of land a warranty is implied, because of the privity of the estate. Upon partition the parties are in *æquali jure*. There is supposed to be mutual confidence, by reason of the privity of estate, and, if the

common fund is not so large as the parties suppose, either from defect of title or of unsoundness as to part, the loss should be borne equally.

It is the duty of the court, through its commissioners, to ascertain what estate exists, before proceeding to make a partition of the same, or confirming such partition.

Appeal from Circuit Court, Logan county.

Bill of review filed by E. W. Clark and others, trustees, in the case of Sylvanus Dingess and another against Henry Marcum and others. From a judgment dismissing the same, complainants therein appeal. Reversed.

J. S. Clark and C. M. Turley, for appellants.

H. K. Shumate and J. B. Wilkinson, for appellees.

ENGLISH, J.—At the July rules, 1891, held for the circuit court of Logan county, Sylvanus Dingess and Jane Dingess, his wife, brought a suit in equity against the widow and heirs of Gideon Marcum, deceased, for the partition of the real estate of which said Gideon Marcum died seised and possessed, among the several children and heirs-at-law of said Marcum. The land was to be partitioned among eleven heirs, or those holding under them, respectively. E. W. Clark, W. W. Justice and Samuel Chauvenet, trustees, were the owners of two shares of said lands, and filed their petition alleging that fact, and praying that their two shares be laid off together, and adjoining their own lands, which was done by commissioners appointed to make said partition, which action was confirmed, without exception or objection. After said partition was decreed, and deeds made to the respective parties to whom the parcels of land had been set apart and allotted by the commissioners, E. W. Clark, Jos. I. Doran and Saban W. Colton, Jr., filed a bill of review, making the parties to the original bill defendants. In said bill of review said plaintiffs, among other things, allege that they are the owners of large boundaries of land situated in Logan county, W. Va., and that they hold said lands as trustees for certain stockholders, to them unknown, and have full

power and authority to prosecute and defend all suits and all proceedings respecting the subject-matter of their trust as fully and effectually as if the *cestuis que trustent* were made parties in any proceeding affecting the lands which they hold as trustees; that as such trustees they purchased the interests of Malinda Bailey and Jane Dingess in and to all the lands of which Gideon Marcum died seised, which lands are situated mainly in the county of Logan; that, at the time said purchase was made, one W. W. Justice and Samuel H. Chauvenet were connected as trustees with the said E. W. Clark, but that, since said purchase was made, S. W. Colton and Jos. I. Doran have been duly substituted as trustees in the place of said W. W. Justice and Samuel H. Chauvenet, and all the lands and rights and interests which were owned by the said Clark, Justice and Chauvenet, trustees, have been duly conveyed and transferred from said Clark, Justice and Chauvenet, trustees, to said Clark, Colton and Doran, trustees, including the above-mentioned lands and interests purchased of Jane Dingess and Malinda Bailey, which represent two interests or two shares of the Gideon Marcum estate as aforesaid; that one Sylvanus Dingess, who was the husband of Jane Dingess, at July rules, 1891, instituted in the circuit court of Logan county a suit in chancery against the widow and heirs of Gideon Marcum, deceased, for the partition of the real estate of which the said Gideon Marcum died seised. And the plaintiffs proceed to set forth said original bill in substance, together with the answers, petitions and proceedings had therein, including the report of the commissioners appointed to partition the land, and the final decree making partition of said land among the respective parties, and directing deeds to be made to the respective parties. The plaintiffs, in the bill of review, further say that since the entering of said last-named decree, on the 20th day of January, 1893, S. S. Vinson and others conveyed by deed all their right, title and interest in and to their interest as laid off to them

in said land to the Logan Cannel Coal Company, a corporation, as shown by a copy of the deed filed therewith; that all of the land laid off to S. S. Vinson was wild land, and its chief value consisted in the valuable timber standing thereon, and that said Logan Cannel Coal Company has since cut and removed all of the valuable timber from said land, amounting to several thousand dollars, which should be taken and considered in any partition of said lands; that said decree confirming said report gives to plaintiffs a tract of land which purports to be of about 109 7-10—105 acres on the east side of Twelve Pole, adjoining other lands owned by the plaintiffs near the Gideon D. Marcum homestead, and also another tract of 115—110 acres in Wayne county, known as the "Kelley Place;" that since said partition was made, and since the report of the commissioners was confirmed, and since the decree has been passed directing deeds to be made to each for their respective interests, they have had the 109 7-10—105 acre tract surveyed, and in making said survey the plaintiffs have discovered that there are about thirty-five acres of the land that are held by an adverse title, which is older and superior to that of said Gideon D. Marcum, deceased, and that said title is now owned and the lands occupied by Edward Illsly, and plaintiffs are unable to get possession of the land which said commissioners allotted to them; that, at the time said commissioners made said allotment, they believed that the estate of Gideon D. Marcum was the only claimant or owner of the whole of said 109 7-10—105 acres of land, and they knew no better until after their report had been made, filed and confirmed, and until after they had gone upon the lands and run it out, long after the report had been made and confirmed. The plaintiffs further allege that the tract of land in Wayne county which said commissioners allotted to the plaintiffs was sold for taxes thereon for the years 1890 and 1891, and that it was bought in at the tax sale by one J. C. Miller, and afterwards the clerk of the

county court of Wayne county made and executed a deed to said Miller, conveying to him the whole of said tract of land, and that said Miller has now taken possession of the same, all of which was unknown to said commissioners at the time they made their partition as aforesaid, and was also unknown to the plaintiffs at the time said partition was made, and at the time the report was filed and confirmed. Plaintiffs further say that they paid a very large sum of money for the interest in the estate of Gideon Marcum, deceased, and, without any fault of theirs, that the shares which have been allotted to them are held adversely to them, and cannot be recovered by the plaintiffs, with the exception of a part of the 109 7-10 acre tract which was set apart to the plaintiffs near the Gideon D. Marcum homestead; that upon equitable division of the estate of Gideon D. Marcum, deceased, they are entitled to two-elevenths of all the lands that were owned by Gideon D. Marcum at the time of his death, and that, if they received what they are entitled to, they would have allotted and laid off to them about 260 acres of land, representing two-elevenths of the whole property, but, on the contrary, that they have received less than sixty acres of the land, through the mistake of the commissioners who allotted it to them, and through the forfeiture of the title at the tax sale while the proceedings were pending to partition the estate; that it would be unconscionable to force them to accept sixty acres of land, through the mistake of said commissioners, and allow the other heirs of Gideon D. Marcum, deceased, to have their full shares and enjoy their full benefits, and force all the loss which was occasioned to the estate before it was partitioned upon the plaintiffs alone. And they pray that said lands may be sold, and the proceeds divided and distributed in proportion to the respective shares, or that it may be partitioned, if capable of an equitable and just partition, and the interest of each set apart; that their bill of review may be filed, and the decree confirming said report may be set aside and re-

versed; that the said report may be set aside and a new partition directed to be had between all the parties concerned; and for general relief. This bill of review appears to have been sworn to and tendered on the 7th day of May, 1894, and was then objected to. On the 20th day of June, 1894, H. C. Ragland was elected as special judge to hear this case, who, having considered the objections made at a former time to the filing of said bill of review, overruled said objections, and allowed said bill to be filed; and thereupon the defendant Henry Marcum filed his demurrer to the said bill of review, in which the plaintiffs joined, and the said demurrer was set down for argument, and the court, upon consideration, sustained said demurrer, and, the plaintiffs declining to amend, said bill of review was dismissed at the costs of plaintiff; and from this action of the court the plaintiffs in said bill of review appealed.

The only error assigned by the appellants is that "the court erred in sustaining the demurrer and dismissing the bill, because its allegations abundantly showed that the evidence discovered by the appellants after the final decree in the original suit was amply sufficient, if taken before the hearing upon the original bill, to have sustained appellants' contention, and said after-discovered evidence could not have been by said petitioners ascertained, by the use of due diligence, before the hearing of the original cause." Now, in order that a bill of review may be sustained, it is necessary that a final decree should have been rendered in the cause which is sought to be reviewed, and the causes for which a bill of review may be maintained are limited as follows: (1) There must be error in law apparent upon the face of the decree; or (2) the party seeking to review the decree must allege and prove the discovery of new matter, which could not have been used at the time of making the decree, in consequence of the party's ignorance that such matter existed. In the case under consideration the plaintiffs in the bill of review seek to sustain their bill

under the second of the causes above named, to wit, new matter discovered after the date of the decree complained of. In the case of *Carter v. Allan*, 21 Gratt. (Va.) 241, CHRISTIAN, J., delivering the opinion of the court, speaking of the requirements and characteristics of such a bill, says: "Such a bill must not only set forth the discovery of new matter, which was discovered after the decree, but it must be accompanied by an affidavit that the new matter could not be produced or used, by the party claiming the benefit of it, in the original cause; and the affidavit must also state the nature of the new matter, in order that the court may exercise its judgment upon its relevancy and materiality (citing Story, Eq. Pl. § 412). In the first place, the new matter must be relevant and material, and such as if known, might probably have produced a different determination. In the next place, the new matter must have first come to the knowledge of the party after the time when it could have been used at the original hearing. Another qualification of the rule, quite as important and instructive, is that the matter relied upon must not only be new, but it must be such as the party, by the use of reasonable diligence, could not have known." Now, when we look to the bill of review in question, it is apparent that all of these material requisites have been complied with by the allegations of the bill, and the bill is sworn to. In the case of *M'Call v. Graham*, 1 Hen. & M. (Va.) 12, it was held that where a decree has been affirmed by the court of appeals a bill of review ought not to be granted to reverse it for any errors on the face of the proceedings, but if new matter be produced, which was unknown to the party applying, at the time of the decree, the court may, and, if the evidence warrants it, ought to, grant such a bill of review. So, in *Winston v. Johnson's Ex'rs*, 2 Munf. (Va.) 305, it was held that "new matter is no ground for a bill of review, unless it was discovered since the decree was pronounced." See, also, *Ellzey v. Lane's Ex'x*, 2 Hen. & M. (Va.) 589; *Wiser v. Blachly*, 2 Johns. Ch. (N. Y.)

488. So, in Enc. Pl. & Pr., under the title "Bill of Review," the law is thus stated: "The new matter for which a bill of review will lie must be relevant and material—such as would probably have changed the result had it been brought forward, and which was not known to the plaintiff or his attorney in time to be used in the suit, and could not have been known by the use of reasonable diligence. Newly-discovered evidence which is merely cumulative, or goes to impeach the character of witnesses, is not sufficient." In the case of *Henry v. Davis*, 13 W. Va. 230, this court held that "when the Supreme Court of Appeals makes a decree, and sends the cause back for further proceedings, there cannot be a bill of review to correct the decree for error apparent. By 'error apparent' is meant such as appears upon the face of the proceedings, and that includes all that was included in the issue; but a bill of review, or supplemental bill in the nature of a bill of review, will lie for after-discovered evidence, subject to the rules applicable thereto." As to the principles governing the filing of bills of this character, see *Nichols v. Heirs of Nichols*, 8 W. Va. 174, and *Amiss v. McGinnis*, 12 W. Va. 371. Barton, in his *Chancery Practice*, on page 336, states the requirements when a bill of review is based on after-discovered evidence, and says, "It is never a matter of right, but rests in the sound discretion of the court."

When we look at the allegations of this bill in the light of the authorities we have quoted, we can but think it complies with the requirements. The court, in making this partition, appointed a surveyor to go upon the lands, and carefully examine and lay off the lands, and assist the commissioners in making partition of the lands, which duty he complied with, and returned his field notes with the report. This report was made under the immediate supervision of the court, and it must be presumed that neither the surveyor nor the court had any knowledge of the interest mentioned in the bill of review, depriving the plaintiffs of

so much of their valuable land, or the decree of partition would not have been confirmed, making such an unequal distribution of the property. Besides, there is an implied warranty in case of partition. Rawle, Cov. § 270, says: "In the case of a partition (which, as is familiar, was only allowed, by the common law, as between parceners) a warranty was implied from the partition itself." Freem. Co-Ten. p. 708, § 533, says: "In partition of land a warranty is implied, because of the privity of estate. . . . Upon partition the parties are *in æquali jure*. There is supposed to be mutual confidence, by reason of the privity of estate. There is no chaffering or trafficking about it. Third persons, selected by themselves or appointed by the court, make the division; and if the common fund is not so large as the parties suppose, either from defect of title or of unsoundness as to part, the loss should be borne equally. In other words, in partition there is an implied warranty, both as to title and soundness." It was the duty of the court, through its commissioners, to ascertain what land Gideon Marcum died seised and possessed of, before it undertook to partition the same among the parties entitled thereto. The tract of land in Wayne county might have been sold to some other party by said Marcum in his lifetime, instead of being sold for taxes, and instead of thirty-five acres being taken of the part allotted to plaintiffs, by better title, the whole thereof might have been taken; and yet it would have been inequitable to allot to the other heirs lands with good titles and partition to the plaintiffs land which did not belong to the estate. And, relying on the implied warranty, it was not the duty of plaintiffs to investigate the titles during the pendency of the partition. As soon as the plaintiffs ascertained the injustice that had been done them, they sought their remedy by bill of review. As their bill was presented in due time, and upon examination of the authorities, my conclusion is that the bill of review complies with the requirements of the law; and the court erred in sustaining

the demurrer thereto and dismissing the plaintiffs' bill. The decree complained of must be reversed, and the cause remanded, with costs to the appellants.

Bill of Review—Affirmed Decree—Application to Appellate Court—Newly-discovered Evidence—Impeaching Witnesses—Cumulative Evidence—Negligence.

SOCIETY OF SHAKERS v. WATSON ET AL.

(Circuit Court of Appeals, Sixth Circuit. December 8, 1896.)

(77 Fed. Rep. 512.)

An application for leave to file a bill of review after the decree has been affirmed is properly made to the appellate court.

The discovery of new evidence, or of new witnesses, impeaching witnesses upon the original hearing, or for the purpose of showing subornation or perjury of such witnesses, is not generally regarded as a sufficient ground for allowing a bill of review. And this is especially the case when the credibility of the witnesses was directly put in issue at the original hearing.

When the newly-discovered evidence does not consist of documents or other irrefragable evidence, but in the mere cumulation of witnesses to a fact once litigated, permission to file a bill of review should rarely be allowed. The new evidence, if cumulative merely, should be very clear, highly pertinent, and so well proven as to be controlling in its influence.

Failure to prove at the original hearing the loss of books, the contents of which were sought to be proved by secondary evidence, so that such evidence was excluded, *held* to be such gross negligence as would prevent the subsequent discovery of the books from being good ground for filing a bill of review, though it be then shown that the books were in fact lost at the time of the original hearing.

Leave to file a bill of review will be denied when the effect of the newly-discovered evidence is at most merely to increase an existing doubt as to the real truth of the matter in issue.

Petition for leave to file a bill of review.

Stone & Sudduth, P. B. Thompson, Sr., and Humphrey & Davie, for petitioners.

St. Geo. R. Fitzhugh and C. A. Hardin, for respondents.

Before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge.

LURTON, C. J.—This is an application for leave to file a bill of review upon the ground of newly-discovered evidence. The original decree was pronounced by the circuit court for the district of Kentucky in June, 1894. Upon an appeal to this court, this decree was affirmed June 8, 1895. A petition to rehear was filed, and, upon consideration, denied. A petition was then filed in the Supreme Court praying that court to take the case upon a writ of *certiorari*. This, too, was denied in April, 1896. The case was remanded by this court to the circuit court, with directions that its decree be affirmed and executed. The opinion of this court is reported in 68 Fed. Rep., at page 730, and in 15 C. C. A., at page 632.

As this is but a continuation of that case, we shall take it up from the point where that report left it. As the decree sought to be reviewed is, in fact, the decree of this court, the application for leave to file a bill of review is properly made here: *Southard v. Russell*, 16 How. 547; *Kingsbury v. Buckner*, 134 U. S. 650–671, 10 Sup. Ct. Rep. 638; *Bank v. Taylor*, 4 C. C. A. 55, 53 Fed. Rep. 854. On a mandate from this court the circuit court can only record our decree and proceed with its own decree as affirmed, or upon the decree it was directed to enter, and has no power to alter, rescind or modify such decree, unless leave to do so is reserved, or first had and obtained by application to this court. The decrees and mandates of this court have precisely the same finality as the decrees and mandates of the Supreme Court: *Bissell Carpet-Sweeper Co. v. Goshen Sweeper Co.*, 19 C. C. A. 25, 72 Fed. Rep. 545.

The original bill was filed for the purpose of obtaining payment of a note in these words :

“(9,985.)

OCTOBER 18, 1882.

“Seven years after date we promise to pay to the order of M. M. Mays or Barer the Some of Nine thousand Nine hundred and eighty-five-100 Dollars, value received, with interest at the rate of 6 per cent per annum from date until paid. Negotiable and payable at the 4 Natiol Bank cincinnati, if not paid when dew to Bring 8 per sent from date.

“DUNLAVY & SCOTT,

“Trustees of the Society of Shakers at Pleasant Hill, Ky.”

The ground upon which equitable jurisdiction was rested is fully discussed and decided in the opinion of this court heretofore cited, and need not be here referred to. This note, before maturity, was indorsed to Oliver Watson, and by the latter transferred as collateral to Henry Souther. A number of defences were interposed, all of which were considered both by this and the circuit court. Among these defences heretofore litigated, and decided adversely to the petitioners, was the defence that the note did not represent a real transaction and rested upon no consideration ; that in fact M. M. Mays was an impecunious person, having no money to lend, and was wholly without credit or character ; and that he had not in fact loaned the money represented by said note to said society or its trustees, nor to Dunlavy or Scott, officially or personally. Touching this defence this court said :

“We are entirely satisfied that Dunlavy signed the note ; that is, that the signature is in his handwriting. This was almost conceded by counsel for defendants in the argument. But the evidence leaves it clear enough. This fact goes far towards proving the good faith of the transaction. Dunlavy's reputation for integrity is not impugned. He appears always, during his life, to have had the entire confidence of the society, and was trusted by it in its most

important business affairs. There is no ground whatever shown for suspecting him. Nor is there any proof that the instrument is not such as was intended. It recites that the consideration for which it was given was in fact received. There is affirmative proof from witnesses that the money represented by the note was paid, and there is no proof to the contrary. The law presumes good faith and fair dealing. There is nothing but the singularity of the transaction to raise a suspicion of anything wrong, and this is not sufficient to overcome the positive evidence supported by the legal presumption. It is not necessary, therefore, to determine whether Watson is a '*bona fide* holder,' as that term is employed in the law of negotiable paper. We think the decree of the court below is right, and it is accordingly affirmed:" 15 C. C. A. 632, 68 Fed Rep. 741, 742.

The newly-discovered evidence upon which petitioners seek to reopen said decree relates wholly to this question of the consideration for the note, or its fraudulent obtension [*sic*] by M. M. Mays, the payee. The business affairs of the Shaker Society were managed entirely by three trustees chosen by the community, who were general agents and trustees. At the date of the making of this note, October, 1882, these three trustees were B. B. Dunlavy, E. Scott and Stephen Boisseau. Two of them, Dunlavy and Scott, died before suit was brought. The survivor, Stephen Boisseau, was a witness, and testified in the case, but has since died. The bill of review, which accompanies the petition for leave to file same, undertakes to state the newly-discovered evidence, and affidavits of the witnesses by whom this new evidence is to be made are filed with the bill of review as exhibits. The defendants have, by leave of court, filed certain counter affidavits. The points upon which new evidence is said to have been discovered are these:

First. It is said that the complainants in the original suit sought to establish that the note in suit had been executed

for money loaned by said M. M. Mays by the testimony of Mary Myers and Fannie Owens, two married daughters of the payee, who did not himself testify, though living and competent as a witness. It is then charged that the testimony of said Mary Myers and Fannie Owens "was fraudulent and perjured proof; that they had been suborned to testify by their father, M. M. Mays," and were induced or compelled by him to give their sworn depositions in that case, and swear that they had seen the money paid to B. B. Dunlavy by M. M. Mays at the time the note was executed. The discovery of new evidence, or of new witnesses, impeaching witnesses examined upon the original hearing, or for the purpose of showing subornation or perjury of such witnesses, is not generally regarded as a sufficient ground for allowing a bill of review. This was a point involved in *Southard v. Russell*, 16 How. 547-568. In that case it was sought to review the decree upon the ground that the successful party had suborned and bribed a principal witness, who had delivered important evidence in his favor. Justice NELSON, for the court, touching this ground for relief, said:

"Without expressing any opinion as to the influence this fact, if produced on the original hearing, might have had, it is sufficient to say that it does not come within any rule of chancery proceedings as laying a foundation, much less as evidence in support of a bill of review. The rule, as laid down by Chancellor KENT (*Livingston v. Hubbs*, 3 Johns. Ch. (N. Y.) 124) is that newly-discovered evidence which goes to impeach the character of witnesses examined in the original suit, or the discovery of cumulative witnesses to a litigated fact, is not sufficient. It must be different, and of a very decided and controlling character: *Brewer v. Bowman*, 3 J. J. Marsh. (Ky.) 492; 6 Madd. 127; Story, Eq. Pl. § 413. The soundness of this rule is too apparent to require argument, for, if otherwise, there would scarcely be an end to litigation in chancery cases, and a temptation

would be held out to tamper with witnesses for the purpose of supplying defects of proof in the original cause."

See, also, *U. S. v. Throckmorton*, 98 U. S. 61 ; *Maddox v. Apperson*, 14 Lea, (Tenn.) 596 ; *Barrett v. Belshe*, 4 Bibb, (Ky.) 348 ; *White v. Fussell*, 1 Ves. & B. 151 ; *Kimberly v. Arms*, 40 Fed. Rep. 548.

Another objection is that upon the original trial the credibility of these witnesses, Mrs. Myers and Mrs. Owens, was put directly in issue. Evidence was then made of statements made by them to a Mrs. Young, inconsistent with their evidence. There was also evidence attacking their character for truth and veracity, chiefly based upon the influence of their father, as evidenced by their frequent appearance as witnesses in his behalf. Much of this testimony was incompetent, and much more was of slight importance, being for the most part deductions drawn by witnesses from insufficient data. Still, the veracity of these witnesses was a litigated fact, and the new evidence is in that respect cumulative in character, and rests upon no such solid basis as a conviction for perjury or the production of documents of unequivocal character. While there is no universal or absolute rule, as is said by the Supreme Court in *Craig v. Smith*, 100 U. S. 226, prohibiting the courts from allowing a bill of review upon the ground of newly-discovered evidence as to facts once in issue, still it is said, in the same case, that the allowance of leave to file such a bill upon that ground "is not a matter of right in the party, but of sound discretion to the court, to be exercised cautiously and sparingly." Where the new evidence does not consist in documents or records or other irrefragable evidence, but in the mere cumulation of witnesses to a fact once litigated, permission to file a bill of review should rarely be allowed. The new evidence, if it be cumulative merely, should be very clear, highly pertinent and so well proven as to be controlling in its influence : *Craig v. Smith*, 100 U. S. 226 ; *U. S. v. Throckmorton*, 98 U. S. 61 ;

McDowell v. Morrell, 5 Lea, (Tenn.) 278-283 ; Kimberly v. Arms, 40 Fed. Rep. 548 ; Livingston v. Hubbs, 3 Johns. Ch. (N. Y.) 124 ; Taylor v. Sharp, 3 P. Wms. 371.

In U. S. v. Throckmorton, cited above, Justice MILLER quotes approvingly from the case of Tovey v. Young, Finch, Prec. 193, where the Lord Keeper said :

“ New matter may in some cases be ground for relief, but it must not be what was tried before ; nor, when it consists in swearing only, will I ever grant a new trial, unless it appears by deeds or writing, or that a witness on whose testimony the verdict was given was convicted of perjury, or the jury attainted.”

The evidence relied upon to support this charge of perjury is contained in the affidavit of one W. O. Mays, a brother of M. M. Mays, and an uncle of the two female witnesses he has voluntarily sought to impeach. The affidavit is indefinite. It deals in general statements as to conversations between M. M. Mays and his daughters as to what their evidence would be in this case. Its strength lies in conclusions drawn by the affiant, and is remarkably devoid of details. Certain counter affidavits have been filed by complainants which tend to show that no importance should be attached to the statement of the affiant. No explanation is made by petitioners as to how it comes that the uncle of the implicated witnesses should volunteer an affidavit intended to incriminate his own nieces in behalf of strangers, and in a lawsuit which does not affect him. Nothing tends to show that so surprising an affidavit is to be attributed to a general desire to subserve justice ; on the contrary, it is rather to be ascribed to the hostile sentiments which the counter affidavits show him to entertain towards his brother.

Dunlavy died in 1886. He was the active trustee, and was the one with whom Mays had his dealings, and the maker of the note sued on. Whatever books were kept, showing financial transactions of the society, were kept by

him. Petitioners now say that these books were lost or mislaid, and have only been discovered since the affirmance of the decree of the circuit court. They now exhibit these books, and aver that they contain no entry showing the borrowing of any such sum of money from Mays, or any one else, nor the execution of any such note. These books, especially the one called a "bills payable book," are more in the nature of loose memoranda than orderly business books. The evidence that these "books" show no evidence of such a transaction is of a negative character. That the debtor's books do not show a particular debt claimed may be some evidence that the debt does not exist. Its strength would depend upon other evidence as to the regular habit of the bookkeeper, his exactness, care, honesty, etc. We waive a consideration of the admissibility and weight of this proposed evidence, because we are of opinion that no case is made out which would justify the reopening of this decree upon this point. It was known on the trial that Dunlavy was dead, that he had kept books, and that his books had been carefully and correctly audited, after his death, by an expert accountant. This accountant had been assisted by others, among them Boisseau, the surviving trustee. The deposition of this accountant, whose name was Gates, was taken, and he deposed that no trace of such a note or such a loan appeared on the books. This evidence was excluded because the books were the best evidence, and their absence was in no way accounted for. Petitioners now say that, in point of fact, most diligent effort was made to find and produce them, without result, and that they were only discovered in a most unusual place, long after final decree. If this proof now made as to the loss of these books had been made on the original trial, the secondary evidence as to their contents then offered would have been admissible. The petitioners were clearly guilty of negligence in not laying ground for the secondary evidence in their control as to the contents of these books. This is fatal to the present

application, in so far as it rests upon the introduction of these books as newly-discovered evidence. They then knew of the existence of these books, and of their loss, and they knew that the books contained no record of this loan or the Mays note. Having thus been able to prove the existence of the books and their contents, by secondary evidence, their failure to lay ground for the secondary evidence is gross negligence, and no bill of review will lie to obtain the benefit of such proof after decree: 2 Beach. Mod. Eq. Prac. § 862.

Third. The next, and perhaps the principal, ground upon which this bill of review is predicated, is a charge that said M. M. Mays was entrusted with a blank note signed by Dunlavy and Scott, as trustees, for the purpose of borrowing money for the society from a social society known as the Society of Economists, located in Beaver county, Pa.; that, instead of so using the note, he filled it out payable to himself, and fraudulently indorsed it to Oliver Watson, who they now say is prosecuting this suit for the benefit of said Mays in his own name, and that of Letitia Souther; and that this they can show by newly-discovered evidence. Upon the original trial the defendants denied all consideration for this note, and introduced much evidence tending to cast grave doubts upon the *bona fides* of the transaction. This defence necessarily included the theory now advanced. There was much evidence tending to show that M. M. Mays was an impecunious man, of doubtful character, much in debt and of bad credit. The character of his daughters, by whom it was affirmatively shown that they saw the note signed and delivered, and the money paid over to Dunlavy, was also severely attacked. Contradictory statements made by them were also shown by one Mrs. Young. There was, however, no serious question as to the genuineness of the signature of Dunlavy, and it was also shown that he, for the society, both before and after this transaction, borrowed much money for the Shakers and in their name. No effort

was made to cast discredit upon the character of Dunlavy, and there was no competent proof tending in any way to show that in fact this money had not been borrowed. The affidavits of many of the members of the society are now exhibited to show that they knew nothing of such a loan, nor of any necessity for such a sum of money. Boisseau, one of the trustees, ought to have known most about this matter. Though examined as a witness upon the original trial, he was ominously not interrogated about this matter. Petitioners now say that he has since died, and cannot now be heard to say what he knew of this transaction. His silence, the absence of the trustees' books kept by Dunlavy, and the absence of all evidence from other members of the society, was impressive. The effort to now introduce the books of Dunlavy, and the efforts of members of the society who could and should have spoken upon the original trial, is not admissible under the facts of this case, after final decree. The ordinance of Lord BACON, made to define the right of filing a bill of review, and regulate its exercise, prescribed that no such bill "should be admitted on any new proof which might have been used when the decree was made." This ordinance Lord ELDON said, on the authority of Lord HARDWICKE, had not been departed from: *Young v. Keighly*, 16 Ves. 348. It is not now averred that complainants have discovered any direct evidence assailing the consideration of this note, or supporting the very broad charge that the note was entrusted to Mays as the agent of the society to use in borrowing money, and that it had been misappropriated, or that the complainants are not in fact the holders of the note for value. The evidence which they say is newly discovered, and on which they rely to support this charge, is of more than doubtful value. First, they say that they have lately discovered a certain memorandum book, which they call a "letter register," which was kept by Dunlavy, and which covers the period from August, 1882, to July, 1886, the time of his

death ; that in that register are found memoranda made by Dunlavy of certain letters, purporting to have been written to Mays, and one to a certain Henritza, then president of the Economite Society in Beaver county, Pa. The first memorandum is dated November 2, 1882, of a letter written to Mays, and describes its contents only by saying, "About a loan." The second, to same, is dated November 8, 1882, and says, "Go to Economites for a loan." The third, to same, is dated November 21, 1882, and the memorandum says, "Report progress." The fourth entry is of a letter written to Henritza, the memorandum saying, "For a loan." The next entry is dated December 5, 1882, of a letter to Mays, requesting an answer about a loan. December 15, 1882, a letter to Mays is noted, asking him, "Try other parties about a loan." January 1, 1893, memorandum of a letter to Mays, asking him to "report progress." April 23, a further letter to Mays, saying, "Well supplied, but try for five or six per cent." September 5, 1883, a memorandum of another letter to Mays, asking "if loan could be effected." They say that, in addition to this letter register indicating contents of letters written by Dunlavy to Mays, they have also discovered a letter written by complainant Oliver Watson, to one H. L. Eads, under date of September 14, 1889. They say that Eads was a Shaker belonging to another community, who visited the society of the defendants in September, 1889, after Watson had informed them of the existence of the note in issue. This letter of Watson's is evidently in response to one from Eads in regard to this note. Petitioners say that this letter was never communicated to them, and was accidentally discovered in an unusual place in the room occupied by Eads when staying at their village. That letter is in these words :

"NEW YORK, U. S. A., September 14, 1889.

"H. L. EADS, ESQ.—*Dear Sir* : Yours of the 11th to me at New York forwarded to me at Fredericksburg, Va., from where I am now writing, although I am about leaving for

New York. Mr. M. M. Mays, now living at Fredericksburg, Va., showed me several letters from Messrs. Dunlavy & Scott to him, in substance as follows: The Shaker community, in 1882 or 1883, owed some money, and desired to concentrate these debts, as well as to erect some kind of a manufactory; my recollection is, for making brooms. The trustees wrote Mays, who was acquainted with the Zoarites and Economites, to call upon these parties and arrange, if possible, for the loan. Mays has also letters in answer from Mr. Henritza, declining. Were it not that the relations between Mays and myself are a little strained at present, I would obtain copies of letters, but, if you write him at address given, you will no doubt receive them. The young man whom you saw in New York wrote me you had called, but, owing to my being absent on my summer vacation, I did not receive his letter until a day or two ago, and, as I have had much trouble with my eyes, have avoided writing more than what was imperative. The note of \$9,985 and seven years' interest, I understand, has been forwarded to the bank in Cincinnati, where it is payable, for collection. Trusting this will be satisfactory, I beg to remain,

"Yours truly,

OLIVER WATSON."

Petitioners further say that upon one occasion, while taking proof at Harrodsburg, Ky.; for use in the original suit, St. George R. Fitzhugh, the leading counsel for complainants, "had in his possession several papers purporting to have been signed by B. B. Dunlavy, and showed simply the signatures of said papers to one Poteet, who informed one of the members of the society who was present . . . that he had seen certain papers in Fitzhugh's hands, but did not know what they were; that he had simply seen the signatures." The bill then proceeds by saying that counsel for defendants thereupon "called upon Fitzhugh to produce the papers," and that Fitzhugh produced a letter dated December 4, 1882, written by Dunlavy to Henritza, president of the Economite Society, and said that that was the only

paper he had relating to the subject of controversy in said action. As a conclusion from all the newly-discovered evidence that has been stated, the bill of review then concludes by saying :

“Complainants aver that since finding the letter register and the discovery of the letter from the defendant, Oliver Watson, to H. L. Eads, they are satisfied, and charge the fact to be, that said St. George R. Fitzhugh, at the time of taking said proof, and while he was conducting said cause, had in his possession the letters referred to in the said letter register, and the letters referred to in the letter of said Oliver Watson to H. L. Eads; and they charge that said letters were received by said M. M. Mays, and would and did fully explain how said M. M. Mays came into the possession of said note, and clearly conduced to show that it was given to him for the purpose of securing a loan on behalf of said Society of Shakers at Pleasant Hill, Kentucky, from the Economites, and that he failed to procure said loan; and all of said letters were written after the note sued on bears date, and after the time when the two daughters of M. M. Mays testified that the money was paid and the note delivered, for the attention of the court is particularly called to that part of the testimony of these two women where they say that their father handed over to Dunlavy a large amount of money, and Dunlavy handed to their father a note. They state that at the time said proof was taken, and until the finding of said register and letter from Watson, they had no means of knowing or suspecting what said papers were that were then in possession of said Fitzhugh as aforesaid; and they charge that these papers were improperly suppressed, and should all have been exhibited.”

In support of this, the affidavit of Poteet is filed, averring that Fitzhugh showed him the signatures of said Dunlavy attached to some five or six different “letters,” which appeared to affiant, who was acquainted with Dunlavy’s handwriting, to be letters written by Dunlavy. They also file

several affidavits of counsel and others present at the taking of proof on the occasion mentioned, showing that counsel for defendants then called upon said Fitzhugh to produce and file said letters so seen by Poteet, and that Fitzhugh did, after consulting with associate counsel, produce and file a letter of Dunlavy to Henritza of December 4, 1882, and declared that he had no other paper in his possession touching this matter. The actual truth as to the consideration for this note was not established to the entire satisfaction of this court upon the hearing of the appeal. The impecunious condition of Mays, which was well established, made the matter one of some singularity. That a man indebted as Mays was shown to be should have so large a sum to loan on so long a credit, was peculiar. Still, it does not follow that a man refusing to pay his debts and having no visible estate, may not have secret means, and might not, in order to secure it against creditors and make provision for the future, make just such a loan as the one in question. Certainly, the presumptions from the mere execution of the note were not overcome by mere evidence of the mysteriousness and singularity of the transaction. There was, in addition to this presumption, the affirmative evidence of Mrs. Myers and Mrs. Owens, already mentioned; and to this was added the testimony of one Bailey, who proved that in 1882 he was offered this note by Mays, and went to see the Shakers about it, to know if they were disposed to pay it before maturity. Bailey swore that he saw Scott, one of the trustees, who took him to one of the others, presumably Dunlavy, and that the latter said that the note had a number of years to run, and that they were not prepared to pay it before due. Although the character of Bailey and the two female witnesses was assailed, yet there was no affirmative evidence impeaching the genuineness or consideration for this note. Thus, the genuineness and the consideration of this note were facts in issue, and decided adversely to petitioners on the former trial. If the evidence

now sought to be introduced is material at all, it is so only as tending to show that after the date of this note, December 18, 1882, B. B. Dunlavy was in correspondence with Mays about procuring for the society a loan of money, and also with one Henritza about the same thing. Neither the memoranda on Dunlavy's letter register nor Watson's letter to Eads contains any intimation that Mays had been entrusted with the note here in issue as an agent, for negotiation, or with an unfilled note for that or any other purpose. The charges made so emphatically are a mere deduction from facts stated, which do not justify such a conclusion. The fact that Dunlavy and Mays were in correspondence about a loan, and that Mays was endeavoring to procure a loan for them, was fully in evidence before. The letter register of Dunlavy under date of December 4, 1882, notes a letter to Henritza "for a loan." That letter was identified and filed by complainants on original hearing. In this letter Mr. Dunlavy wrote, among other things, as follows:

"There was a gentleman here on business, from the neighborhood of Zoar, in Ohio, and in conversation with him we mentioned our intention of borrowing some funds to develop two new enterprises that were starting. A patent dump-wagon factory and the manufacture of Shakers' Aromatic Elixir of Malt, which required more ready capital than we could raise in short enough time from our regular income, provided we could obtain a loan at low rates of interest. This gentleman, M. M. Mays, remarked that Zoarites and Economites frequently had surplus funds to loan. . . . We would therefore be pleased to learn whether it would suit your convenience to supply us with any amount from \$5,000 to \$15,000, and the lowest interest at which you could place it. . . . Our friend Mays writes us that he applied to Zoar, and they informed him that they had placed all they had to spare a few days since, and would not have any more to spare till next April, when they could

furnish \$10,000. But it would be a great accommodation to us to receive it this side of Christmas."

"Dunlavy adds in a postscript: 'If necessary, I would visit your institution to fix up the papers, if you can furnish the accommodation, but it would be less trouble and expense to transact the business through the banks.'

"And as the brethren at Zoar referred our friend Mays to your people, giving your name and Lentz to address, we proposed to Mays to visit your place for the purpose, but do not know whether he has done so or not, as he has not reported, but would be pleased to know that he has, and the result. If not, would be pleased to receive an answer to the foregoing proposition."

The memoranda from the newly-discovered letter register evidences nothing more material than was shown by this letter. The Watson letter could add nothing. It contains no admissions more material than were abundantly established by the Henritza letter.

This brings us to the question of the Dunlavy letters charged to have been in the possession of Mr. Fitzhugh. The charge of the bill in this regard is supported alone by the Poteet affidavit. Mr. Fitzhugh, in a full affidavit, denies that he had or has any other letter written by Dunlavy than the one he filed on original trial. On this showing it would be most rank folly to reopen the case to get the letters which he denies ever having had. But what evidence is there to show that, if other letters were in the hands of Mr. Fitzhugh, they contain any statement touching the execution of the note in suit? None whatever. Dunlavy's memoranda contains no intimation that he had ever entrusted Mays with such a note, or any note, to be made payable to the Economite Society, or any other person or society. How odd it is that he refers to no such matter in his letter to Henritza. What more natural, when telling Henritza of Mays's agency, to speak of his authority to fill up a blank note entrusted to him, especially as he refers to

how the papers might be fixed up through the bank, or by a personal visit if necessary. The charge that this note was fraudulently filled up and misappropriated has no sort of support in any of the evidence which is set out as newly discovered. That Dunlavy should want more money after getting a loan from Mays may be a circumstance tending to show that he had not received from Mays the loan evidenced by this note; but that was a circumstance fully in evidence before. It by no means followed that he had obtained no money from Mays in October, 1882, because in November, and for a year afterwards, he was endeavoring to borrow. The old record shows that Dunlavy was a borrowing man, and this new evidence only shows the same thing. The Henritza letter indicates that the loan which Mays had tried to get from the Zoarites and from the Economites was desired, not only to concentrate debts and to reduce rate of interest, but to engage in two new manufacturing enterprises. The inference that, because he wished Mays to secure this money, he had gotten no money from Mays personally, is altogether too remote. But we cannot pass by the Poteet affidavit without saying that we accept Mr. Fitzhugh's explicit denial as entirely satisfactory. The hasty observation of a bunch of letters, "shuffled," as the affiant says, in the hands of Mr. Fitzhugh so as to exhibit Dunlavy's signature, might readily mislead Mr. Poteet into supposing all the letters to be letters of Dunlavy. If the defendants had reason to believe that Mr. Fitzhugh had possession of letters or documents which it was his duty to file as evidence, and that he was wrongfully suppressing evidence which the defendants were entitled to have, they should have sought a subpoena *duces tecum*, or applied to the court for an order on him to produce such letters. They did nothing of the kind. If they called upon him to produce them—a fact which Mr. Fitzhugh denies—they made no record of it, and suffered the matter to drop without bringing it to the attention of the court. Mr. Fitzhugh's denial that he was

called on to file all such letters is rather borne out by the surprising fact that when he sought to identify the Henritza letter, and to file it in the record, the defendants are down on the record as objecting to the offered evidence. Why object if it was produced upon their call?

The charge that defendants have discovered that this suit is prosecuted for the benefit of M. M. Mays, and that he is furnishing the means to carry it on, is not supported by any statement of newly-discovered facts. The general charge is insufficient. The new facts should be fully set out which are relied on to make it good. It is, as a general charge, most emphatically denied in a counter affidavit by the counsel who has conducted the cause for the complainants from the beginning. The ownership of the note by Watson, and that he took same in exchange for a valuable estate in Virginia, was fully and satisfactorily made out upon the original hearing. This fact is unshaken by any newly-discovered facts stated in the bill. M. M. Mays is liable as an indorser. That he has any other interest in the case is not indicated by any circumstance in either the old or new record.

The circumstances that Mays was something of an adventurer, and was apparently insolvent, involved this transaction in some mystery. Mays has not testified, but complainants were not called upon to make him a witness. He might have been examined by the defendants if they had seen fit. The truth doubtless was that neither party trusted him. Yet he alone could tell from what source the money came which this note evidences as loaned by him to the Shakers. Doubtless, he had his own reasons for preferring to keep silent as to this. The evidence on the original trial, and that newly discovered, leaves the transaction shrouded in more or less doubt. The presumptions arising from the genuineness of Dunlavy's signature and his unimpeached character were not overthrown by the mystery as to where Mays obtained the money to make such a loan. The new

evidence, when the most that can be said for it is said, only serves to increase the doubt that must always exist as to the real truth of the matter. If we decide against the bill, as we feel constrained to do, it may result in fastening on the defendants an unjust debt. On the other hand, we are not persuaded that this new evidence, including that admissible for lack of due diligence in making it, is of such controlling weight as should under the rules of evidence operate to reverse the decree. So, too, we should not be unmindful of the evil of reopening a litigation once terminated. Lord ELDON, upon a petition of this kind, said of this consideration :

“It is most incumbent on the court to take care that the same subject shall not be put in a course of repeated litigation, and that, with a view to the termination of suit, the necessity of using reasonably active diligence in the first instance should be imposed upon parties. The court must not, therefore, be induced by any persuasion as to the fact that the plaintiff had originally a demand, which he could clearly have sustained, to break down rules established to prevent general mischief at the expense even of particular injury :” *Young v. Keighly*, 16 Ves. 348, 349.

Upon a consideration of the whole case we are constrained to refuse our consent to the filing of this bill of review, though we do so with some misgivings as to the *bona fides* of the transaction as between the defendants and M. M. Mays. We have not meant, either in this or the former opinion, to intimate any opinion as to whether or not the complainants would be affected by a defence good as against M. M. Mays. That question was left undecided, and is still reserved. The costs incurred by this application will be paid by petitioners.

BILL OF REVIEW.

1. Definition and Characteristics of a Bill of Review.—A bill of review is a bill brought to procure the reversal, alteration, modification or explanation of a decree made in a former suit, and is, therefore, analogous to a motion for a new trial or a petition for a rehearing: *Stockley v. Stockley*, 93 Mich. 307; but it differs from a petition for a rehearing in that it can only be brought for error of law apparent on the face of the record, or for new matter arisen or discovered since the decree, while a rehearing opens the case *de novo*, and brings before the court all the evidence as well as the record in the cause. A rehearing, moreover, lies before the decree is rendered, while a bill of review proper lies only after decree: *Taylor v. Sharp*, 3 P. Wms. 371; *McCall v. McCurdy*, 69 Ala. 65; *Mickle v. Maxfield*, 42 Mich. 304; *Goodhue v. Churchman*, 1 Barb. Ch. (N. Y.) 596; *Nichols v. Nichols*, 8 W. Va. 174. The premature filing of a bill of review, however, will not deprive the party of his right to a rehearing: *Mickle v. Maxfield*, 42 Mich. 304; and when a bill of review is brought where a petition for rehearing would properly lie, or when a petition for rehearing is brought where a bill of review should be presented, either will be given effect as the other, if it contains all the essential averments: *Heermans v. Montague*, (Va.) 20 S. E. Rep. 899; *Dellinger v. Foltz*, (Va.) 25 S. E. Rep. 998; *Spilman v. Gilpin*, (Va.) 25 S. E. Rep. 1004. It has also been likened to a writ of error: *Bleight v. McIlvoy*, 4 T. B. Mon. (Ky.) 142; but this is fallacious, as will be seen below. A petition to set aside proceedings in intervention, and allow the petitioner, not a party, to defend, is not a bill of review: *Fischer v. Hanna*, (Colo.) 47 Pac. Rep. 303; a bill to set aside a judgment on the single ground of fraud in suborning the testimony of witnesses is not a bill of review, but a bill to vacate the judgment: *Hinesley v. Sheets*, (Ind.) 46 N. E. Rep. 94; and when, after a final decree for distribution had been made and performed without objection and the receiver discharged, a creditor who participated in the distribution filed a bill without leave of court, not sworn to, nor alleging newly-discovered evidence, in which some of the parties to the former proceedings were made parties and others

were joined, seeking to enforce for the benefit of creditors certain claims in favor of the corporation reported to the court as arising out of a certain transaction, but not sued upon by the receiver, though he was authorized to do so if advised by counsel to that effect, it was held that the bill could not be treated as either a bill for review or a petition for rehearing: *Diamond State Iron Co. v. Alex. K. Rarig Co.*, (Va.) 25 S. E. Rep. 894. The primary object of granting a review is that the case may be reheard before the same judge; and a review before another judge will only be allowed *ex necessitate*, as in case of death, disability or removal: *Maharajah Moheshur Sing v. Bengal Govt.*, 7 Moore Ind. App. 283. A bill of review is a new proceeding, not a mere continuation of the original suit: *Cole v. Miller*, 32 Miss. 89; and rests on equitable principles; and, therefore, will not be allowed to stand on strict law and against equity: *Stevenson's Appeal*, 32 Pa. 318; *Yeager's Appeal*, 34 Pa. 173. The proper mode of objecting to a bill of review is by demurrer: *Nichols v. Nichols*, 8 W. Va. 174; but when a demurrer to a bill of review is overruled the court may, if it pleases, reverse the judgment without further hearing: *Bruschke v. Nord Chicago Schuetzen Verein*, 145 Ill. 433; and the court may hear a demurrer, whether the bill be filed by leave of court or as a matter of right: *McGuire v. Gallagher*, 95 Tenn. 349.

Every court of equitable jurisdiction possesses the power to review its decrees; and therefore a probate court has inherent power to grant a review, which is neither aided nor restricted by a statutory grant of that power in certain cases; except that it may be thereby made a matter of right, when previously it was only of grace: *Briggs's Appeal*, 5 Watts, (Pa.) 91; *George's Appeal*, 12 Pa. 260; *Whelen's Appeal*, 70 Pa. 410; *Bucknor's Estate*, 7 W. N. C. (Pa.) 470; *Gillen's Appeal*, 8 W. N. C. (Pa.) 499; *Young's Appeal*, 99 Pa. 74; *Jones's Appeals*, 99 Pa. 124.

2. Bills in Nature of Bill of Review.—When the time for a rehearing has passed, and the decree is not yet entered of record, a supplemental bill in the nature of a bill of review will lie; but only for newly-discovered evidence—never for errors of law apparent on the face of the decree. Such a bill amounts, practically, to a petition for rehearing, and is governed by the rules

applicable to bills of review for newly-discovered evidence: *Davis v. Larner*, Dick. 42; *Lewellen v. Mackworth*, 2 Atk. 40; *Standish v. Radley*, 2 Atk. 177; *Wortley v. Birkhead*, 3 Atk. 809; *Moore v. Moore*, 2 Ves. Sen. 596; *Perry v. Phelps*, 17 Ves. 173; *Spill v. Celluloid Mfg. Co.*, 22 Fed. Rep. 94; *Singleton v. Singleton*, 8 B. Mon. (Ky.) 340; *Wiser v. Blachly*, 2 Johns. Ch. (N. Y.) 488; *Greenwich Bank v. Loomis*, 2 Sandf. Ch. (N. Y.) 70; *Pendleton v. Fay*, 3 Paige Ch. (N. Y.) 204; *Dousman v. Hooe*, 3 Wis. 466.

There are also two kinds of original bills, very similar in their nature to bills of review, which are generally classed with them. These are (1) a bill to review a decree brought by one injuriously affected by a decree, who was not a party to the original suit; and (2) a bill to impeach a decree for fraud. The former of these is governed by precisely the same rules as bills of review; the latter is governed by the rules pertaining to bills of review for errors apparent only. It always lies as of right: *Mussel v. Morgan*, 3 Bro. C. C. 74; *Terry v. Commercial Bk. of Ala.*, 92 U. S. 454; *Ex parte Smith*, 34 Ala. 455; *Mitchell v. Shanberg*, 149 Ill. 420; *Edmondson v. Moseby*, 4 J. J. Marsh. (Ky.) 497; *Elliott v. Balcom*, 11 Gray, (Mass.) 286; *Adair v. Cummin*, 48 Mich. 375; *Dodge v. Northrop*, 85 Mich. 243; *Person v. Nevitt*, 32 Miss. 180; *Berdanatti v. Sexton*, 2 Tenn. Ch. 699; see *infra*, § 9; and when, as is permissible, a bill of review is brought for fraud and the discovery of new matter combined, it still is of right: *Griggs v. Gear*, 8 Ill. 2; *Boyden v. Reed*, 55 Ill. 458; *Winchester v. Winchester*, 1 Head, (Tenn.) 460. But a bill for fraud in submitting testimony alone is not a bill of review. It is a bill to vacate the decree: *Hinesley v. Sheets*, (Ind.) 46 N. E. Rep. 94.

3. Rules Regulating the Practice on Bills of Review.—The rules regulating bills of review were first systematically arranged by Sir Francis Bacon, when Lord High Chancellor of England, as a part of his Ordinances in Chancery; and though the rules themselves are not now often adverted to, their principles are everywhere recognized as binding, and they themselves followed with but slight modifications. The most important of these rules is as follows: "No decree shall be reversed, altered or

explained, being once under the great seal, but upon bill of review, and no bill of review shall be admitted, except it contain either error in law, appearing in the body of the decree, without further examination of matters of fact, or some new matter, which hath arisen in time after the decree, and not any new proof, which might have been used when the decree was made; nevertheless upon new proof that is come to light after the decree made, and could not possibly have been used at the time when the decree passed, a bill of review may be grounded by the special license of the court, and not otherwise:" Bac. Ord. in Ch. 1. According to this, there are two grounds which entitle the party to a bill of review as of right: First, error in law apparent on the face of the decree, and second, new matter arising since the decree, which renders it inequitable; and a third ground which will entitle the party to a review in the discretion of the court, viz., the discovery of new matter, existing at the time of the decree, but not then known to him, and therefore not available: *Gould v. Tancred*, 2 Atk. 534; *Taylor v. Sharp*, 3 P. Wms. 371; *Le Neve v. Norris*, 2 Bro. P. C. 73; *Young v. Keighly*, 16 Ves. 348; *Thompson v. Maxwell*, 95 U. S. 391; *Foy v. Foy*, 25 Miss. 207; *Vaughan v. Cutrer*, 49 Miss. 782; *Campbell v. Snyder*, 27 Oreg. 249; *Riddle's Estate*, 19 Pa. 431; *Bishop's Appeal*, 26 Pa. 470; *Russell's Admr.'s Appeal*, 34 Pa. 258; *Hartman's Appeal*, 36 Pa. 70; *Green's Appeal*, 59 Pa. 235; *Kennedy's Estate*, 15 Pa. C. C. 494; *West v. Shaw*, 32 W. Va. 195. But in California and Texas a bill of review will not lie for matters apparent upon the face of the record. Appeal or error is the only remedy: *San Francisco Sav. & Loan Assn. v. Thompson*, 34 Cal. 76; *Seguin v. Maverick*, 24 Tex. 526; *Moore v. Perry*, (Tex.) 35 S. W. Rep. 838. If a bill of review alleges neither errors apparent, newly-discovered matter, nor fraud, it should be refused filing, or, if already filed, be stricken off: *Nickle v. Stewart*, 111 U. S. 776; *Tilghman v. Werk*, 39 Fed. Rep. 680; *Greer v. Turner*, 47 Ark. 17; *Keck v. Allender*, 37 W. Va. 201.

4. To what Decrees a Bill of Review will lie.—A bill of review was originally held to lie only in purely equitable actions; but since the commingling of common law and equity

powers, especially in the Code States, it would seem to lie to any judgment or decree in a proper case; and has been held to lie to a judgment rendered in *quo warranto* proceedings: *State v. Kolsem*, 130 Ind. 434; one rendered in a suit to enforce a mechanics' lien: *Judson v. Stephens*, 75 Ill. 255; and on an award of arbitrators: *Handy v. Cobb*, 44 Miss. 699; but not to a decree in an election contest, that being a purely statutory proceeding: *Allerton v. Hopkins*, 160 Ill. 448. And though it will not lie after a demurrer to a former bill of review has been allowed: *Dunny v. Filmore*, 1 Vern. 135; *Pitt v. Arglass*, 1 Vern. 441; *Strader v. Byrd*, 7 Ohio, 184; nor to a consent decree; and if brought, will be dismissed on motion: *Webb v. Webb*, 3 Swanst. 658; *Thompson v. Maxwell*, 95 U. S. 391; *Adler v. Vankirk Land & Const. Co.*, (Ala.) 21 So. Rep. 490; *Cornish v. Keese*, 21 Ark. 528; *Ryder v. Phoenix Ins. Co.*, 101 Mass. 548; it will lie to a decree *pro confesso*, or to a final decree entered on a decree taken *pro confesso* for failure to plead: *Ogilvie v. Herne*, 13 Ves. 563; *Prentiss v. Paisley*, 25 Fla. 927; and to a decree on a former bill of review, reversing the prior decree: *Strader v. Byrd*, 7 Ohio, 184. Further, it will only lie to a final decree, and never to an interlocutory one, except, perhaps, when it cannot be superseded: *Bates v. Great Western Tel. Co.*, 134 Ill. 536, affirming 35 Ill. App. 254; or when the complexity of the facts and pleadings are such that to afford relief new parties must be brought in and much additional matter alleged: *Farwell v. Great Western Tel. Co.*, 161 Ill. 522; *Clark v. Garrett*, 6 Lea, (Tenn.) 262; though if it contains the proper averments, it may be treated as a petition for rehearing: *Heermans v. Montague*, (Va.) 20 S. E. Rep. 899; *Dellinger v. Foltz*, (Va.) 25 S. E. Rep. 998; *Spilman v. Gilpin*, (Va.) 25 S. E. Rep. 1004. A decree in a creditor's suit, ascertaining the amounts and priorities of all the debts sought to be established as liens on the real estate, and ordering the sale of the property for the payment of debts, is a final decree: *Core v. Strickler*, 24 W. Va. 689; and so is a decree for the sale of land in partition; or even an award of arbitrators, if the intent to make it final is clear: *Handy v. Cobb*, 44 Miss. 699. A bill of review will lie even after affirmance of the decree by the appellate court: *Parker's Appeal*, 61 Pa. 478; see *infra*,

§ 7. An order denying or dismissing a petition for review is final, and an appeal will lie from it; but an order allowing it is interlocutory, and no appeal lies therefrom: *Johnson v. Shepard*, 35 Mich. 115; *Scriven v. Hursh*, 39 Mich. 98; *Beecher v. M. & P. Rolling Mill Co.*, 40 Mich. 307.

5. Who may bring a Bill of Review.—A bill of review may be brought by the parties to the original suit, their privies in representation, and those whose interests are injuriously affected by the decree, though they are not parties to the original suit; but by no one else: *Thompson v. Maxwell*, 95 U. S. 391; *Fischer v. Hanna*, (Colo.) 47 Pac. Rep. 303; *Vaughan v. Cutrer*, 49 Miss. 782. An heir cannot review a decree against his ancestor: *Curry v. Peebles*, 83 Ala. 225; nor a devisee one against his testator: *Slingsby v. Hale*, 1 Ch. Cas. 122; nor an assignee one against his assignor: *Gibson v. Green*, 89 Va. 524; but the sureties of an administrator may have a bill of review: *Bishop's Estate*, 10 Pa. 469. Further, no one can bring a bill of review but those who are aggrieved by the decree, and by the particular errors assigned, and who will also be benefited by the reversal or modification of the decree in those particulars: *Thomas v. Harvie*, 10 Wheat. 146; *Whiting v. Bk. of U. S.*, 13 Pet. 6; *George v. George*, 67 Ala. 192; *McCall v. McCurdy*, 69 Ala. 65; *Goodrich v. Thompson*, 88 Ill. 206; *Webb v. Pell*, 3 Paige Ch. (N. Y.) 368; *Heermans v. Montague*, (Va.) 20 S. E. Rep. 899; *Chancellor v. Spencer*, 40 W. Va. 337; *Laidley v. Kline*, 25 W. Va. 208; but all the parties to the original bill and all those affected by the decree, though not parties, must be made parties to the bill of review; and it should state their names, the interest of each, and the manner in which they are affected: *Carlisle v. Globle*, 2 Freem. 148; *Hartwell v. Townsend*, 2 Bro. P. C. 107; *Bk. of U. S. v. White*, 8 Pet. 262; *Singleton v. Singleton*, 8 B. Mon. (Ky.) 340; *Mackay v. Bell*, 2 Munf. (Va.) 523; *Ellzey v. Lane*, 2 H. & M. (Va.) 589; *Heermans v. Montague*, (Va.) 20 S. E. Rep. 899; *Riggs v. Huffman*, 33 W. Va. 426; *Kanawha Valley Bk. v. Wilson*, 35 W. Va. 36. The plaintiff in the original suit is a proper party, though no relief is prayed against him: *Talbot v. Minnett*, 6 Ir. Eq. Rep. 83; and a bill to review a decree confirming the sale of real estate by order of court,

which does not bring in the purchaser at the sale, is defective for want of parties, though the purchaser was not a party to the original suit: *Heermans v. Montague*, (Va.) 20 S. E. Rep. 899.

6. The Decree must be Performed.—By the third of Lord Bacon's Ordinances in Chancery the decree must have been performed or obeyed before a bill of review will lie; if it is for land, possession must be delivered; if for money, the money must be paid. This must, therefore, be alleged in the bill, or it will be stricken from the files on motion: *Partridge v. Usborne*, 5 Russ. 195; *Burley v. Flint*, (U. S. C. C.) 9 Repr. 4; *Kimberly v. Arms*, 40 Fed. Rep. 548; *Hoffman v. Knox*, 50 Fed. Rep. 484; *Griggs v. Gear*, 8 Ill. 2; *Horner v. Zimmerman*, 45 Ill. 14; *Forman v. Stickney*, 77 Ill. 575; *Cole v. Burnap*, (Ill.) 45 N. E. Rep. 969; *Wiser v. Blachly*, 2 Johns. Ch. (N. Y.) 488. A failure to perform is not an insuperable objection, however; if the complainant is unable to perform by reason of disability or insolvency, or has given security to perform the decree, and makes uncontradicted affidavit to these facts, the bill will lie notwithstanding: *Davis v. Speiden*, 104 U. S. 83; *Kimberly v. Arms*, 40 Fed. Rep. 548; *Cole v. Burnap*, (Ill.) 45 N. E. Rep. 969; *Livingston v. Hubbs*, 3 Johns. Ch. (N. Y.) 124; *Stallings v. Goodloe*, 3 Murph. (N. C.) 159; *Taylor v. Person*, 2 Hawks, (N. C.) 298. Moreover, if the performance of the decree would extinguish any of the complainant's rights, as by the execution of an acquittance, or the like, he will not be held to performance: *Griggs v. Gear*, 8 Ill. 2; but the performance of a decree requiring the delivery of possession of a house on leasehold premises does not release errors or deprive the party of his right to a bill of review, nor waive his right of homestead, and such a decree must, therefore, be obeyed before a bill of review will lie: *Kuttner v. Haines*, 135 Ill. 382. Further, the complainant is only required to perform what the decree requires of him individually, and not the whole decree; and accordingly, when a decree in a proceeding to enforce a mechanic's lien ordered the sale of the landlord's interest under a contract made by the tenant without the landlord's knowledge, and required the tenant to pay a sum of money found due, and in default of payment decreed that the

premises should be sold, it was held that the landlord was not bound to pay the debt before bringing a bill of review: *Judson v. Stephens*, 75 Ill. 255. Finally, the performance of a decree is not an essential to the jurisdiction of the court; it is a personal privilege of the defendant, which he may waive if he chooses; and if he does not move to strike the bill from the files or to dismiss the suit on this ground when he first appears, he should be held to have waived it. *A fortiori*, if he answers or demurs without raising the objection, he waives it, for those pleadings admit that the bill is properly in court: *Cochran v. Rison*, 20 Ala. 463; *Forman v. Stickney*, 77 Ill. 575; *Bruschke v. Nord Chicago Schuetzen Verein*, 145 Ill. 433.

7. For what Errors a Bill of Review will lie.—Under the English practice, the error which will support a bill of review must be one apparent on the face of the decree as enrolled. Nothing can be looked at but the decree itself. Errors of judgment, or errors of fact, though they may be ground for appeal, are not ground for a bill of review, unless they appear as such in the decree: *Grice v. Goodwin*, 1 Eq. Cas. Abr. 165; *Mellish v. Williams*, 1 Vern. 166; *Worge v. Bradley*, Dick. 570; *Hartwell v. Townsend*, 2 Bro. P. C. 107; *Trulock v. Robey*, 15 Sim. 265, affirmed, 2 Ph. 395; *Haig v. Homan*, 8 Cl. & Fin. 320; *Tommey v. White*, 1 H. L. Cas. 160; *Green v. Jenkins*, 1 De G., F. & J. 454; but a decree contrary to the enactment of a statute, or some principle or rule of law or equity recognized or settled by decisions, or at variance with the forms and practices of the court, is patent error; *e. g.*, a decree against an infant without a day to show cause: *Perry v. Phelps*, 17 Ves. 173; or a decree that legacies were charged upon real estate by a will set out in the pleadings, when, upon the true construction of the will, they were not so charged: *Kelly v. Lennon*, 1 J. & L. 305. In America, however, owing to the fact that the decree is not literally enrolled on parchment, as in England, the rule is that the record, and that only, is to be considered, the record, however, for this purpose, including the bill, answer, replication and other pleadings, the orders and other proceedings, the opinion of the court, depositions attached to the pleadings, and facts admitted by the pleadings or incorporated into the decree, as well as the

decree itself. But the court cannot go beyond these, and examine the evidence to see if it substantiates the facts found; it can only decide whether or not the law has been applied correctly to these facts. If it has been erroneously applied, it will reverse the decree; if not, it will affirm it, without regard to the evidence. The only remedies for trying questions of fact are rehearing, appeal, or writ of error: *Bk. of U. S. v. Ritchie*, 8 Pet. 128; *Whiting v. Bk. of U. S.*, 13 Pet. 6; *Dexter v. Arnold*, 5 Mason, (U. S.) 303; *Putnam v. Day*, 22 Wall. 60; *Buffington v. Harvey*, 95 U. S. 99; *Thompson v. Maxwell*, 95 U. S. 391; *Beard v. Burts*, 95 U. S. 434; *Shelton v. Van Kleeck*, 106 U. S. 532; *Brown v. White*, 16 Fed. Rep. 900; *Contee v. Lyons*, 19 D. C. 207; *Caller v. Shields*, 2 Stew. & Port. (Ala.) 417; *P. & M. Bk. v. Dundas*, 10 Ala. 661; *McDougald v. Dougherty*, 39 Ala. 409; *Ashford v. Patton*, 70 Ala. 479; *Wood v. Wood*, 59 Ark. 441; *Griggs v. Gear*, 8 Ill. 2; *Turner v. Berry*, 8 Ill. 541; *Evans v. Clement*, 14 Ill. 206; *Getzler v. Saroni*, 18 Ill. 511; *Ebert v. Gerding*, 116 Ill. 216; *Jackson v. Jackson*, 144 Ill. 274; *Bruschke v. Nord Chicago Schuetzen Verein*, 145 Ill. 433; *Saum v. Stingley*, 3 Clarke, (Iowa,) 514; *Dougherty v. Morgan*, 6 T. B. Mon. (Ky.) 151; *Alexander v. Slavens*, 7 B. Mon. (Ky.) 351; *Tomlinson v. McKaig*, 5 Gill, (Md.) 256; *Hollingsworth v. McDonald*, 2 Harr. & J. (Md.) 230; *Foy v. Foy*, 25 Miss. 207; *Wiser v. Blachly*, 2 Johns. Ch. (N. Y.) 488; *Goodhue v. Churchman*, 1 Barb. Ch. (N. Y.) 596; *Webb v. Pell*, 3 Paige Ch. (N. Y.) 368; *Stevens v. Hey*, 15 Ohio, 313; *Holman v. Riddle*, 8 Ohio St. 384; *Randall v. Payne*, 1 Tenn. Ch. 137; *Berdanatti v. Sexton*, 2 Tenn. Ch. 699; *Burdine v. Shelton*, 10 Yerg. (Tenn.) 41; *Eaton v. Dickinson*, 3 Sneed, (Tenn.) 397; *Ward v. Kent*, 6 Lea, (Tenn.) 128; *Randon v. Cartwright*, 3 Tex. 267; *Barnum v. McDaniels*, 6 Vt. 177; *Shepherd v. Chapman*, (Va.) 21 S. E. Rep. 468; *Lafferty v. Lafferty*, (W. Va.) 26 S. E. Rep. 262; *Lorentz v. Lorentz*, 32 W. Va. 556. It is apparent error, if a statute on which the decree is founded is subsequently declared unconstitutional and void: *Hoffman v. Knox*, 50 Fed. Rep. 484; if the decree is not warranted by the allegations of the bill: *Goodhue v. Churchman*, 1 Barb. Ch. (N. Y.) 596; if the decree is void for want of jurisdiction: *Bruschke v. Nord Chicago Schuetzen Verein*, 145 Ill. 433; if a

foreclosure decree is contrary to the terms of the mortgage : *Mickle v. Maxfield*, 42 Mich. 304 ; or if a solicitor enters an appearance for the defendant without authority, and a decree is rendered against him without service : *Griggs v. Gear*, 8 Ill. 2 ; but a bill of review will not lie to correct mere irregularities of procedure, which do not affect the merits : *Haig v. Homan*, 8 Cl. & Fin. 320 ; *Tommey v. White*, 1 H. L. Cas. 160 ; nor mere errors of form in the decree : *Burley v. Flint*, (U. S. C. C.) 9 Repr. 4 ; *Guerry v. Perryman*, 12 Ga. 14 ; *Fleming v. Stout*, 19 Ind. 328 ; nor errors of calculation : *Massie v. Graham*, 3 McLean, (U. S.) 41 ; nor for matters of abatement : *Slingsby v. Hale*, 1 Ch. Cas. 122 ; *Cramborne v. Dalmahoy*, Freem. 171 ; *Fleming v. Stout*, 19 Ind. 328 ; nor for any error of fact, as said above : *Jackson v. Jackson*, 144 Ill. 274 ; *Rawlings v. Rawlings*, 75 Va. 76. Further, in order to found a bill of review, the errors must have been excepted to : *Train v. Gridley*, 36 Ind. 241 ; *Davis v. Perry*, 41 Ind. 305 ; *Davidson v. King*, 51 Ind. 224 ; and must be specifically pointed out : *Berdanatti v. Sexton*, 2 Tenn. Ch. 699 ; *Livingston v. Noe*, 1 Lea, (Tenn.) 55 ; *La Grange & Memphis R. R. Co. v. Rainey*, 7 Coldw. (Tenn.) 420.

8. Substance of Bill of Review.—While it has been said that it is only necessary that the substance of the record need be set out in a bill of review for errors apparent, it must nevertheless contain substantially everything but the evidence. It is the safer plan, therefore, to recite all the pleadings and proceedings in full, and it is imperative that this should be done with regard to the decree : *Goldsby v. Goldsby*, 67 Ala. 560 ; *Groce v. Field*, 13 Ga. 24 ; *Judson v. Stephens*, 75 Ill. 255 ; *Cole v. Burnap*, (Ill.) 45 N. E. Rep. 969 ; *Enochs v. Harrelson*, 57 Miss. 465 ; *Randon v. Cartwright*, 3 Tex. 267 ; *Hatcher v. Hatcher*, 77 Va. 600 ; *Dunn v. Renick*, 40 W. Va. 349. A mere synopsis or skeleton of the original bill, pleadings or decree is not sufficient, much less a mere reference to them : *Gardner v. Emerson*, 40 Ill. 296 ; *Goodrich v. Thompson*, 88 Ill. 206 ; *Aholtz v. Duffee*, 122 Ill. 286 ; *Kuttner v. Haines*, 135 Ill. 382 ; *Cox v. Lynn*, 138 Ill. 195 ; but a bill of review which set out in full the original bill, the summons issued thereon, the return of service indorsed on the summons, the entry of defendant's ap-

pearance, the orders of default and reference, the master's report and the depositions attached, and the final decree based on that report, has been held sufficient: *Bruschke v. Nord Chicago Schuetzen Verein*, 145 Ill. 433. The bill must also specify the errors relied on: *Kachlein's Appeal*, 5 Pa. 95; *Yeager's Appeal*, 34 Pa. 173; *Russell's Admr.'s Appeal*, 34 Pa. 258; *McDowell v. Morrell*, 5 Lea, (Tenn.) 278; *Rodgers v. Dibrell*, 6 Lea, (Tenn.) 69; and point out wherein the complainant is aggrieved thereby: *Bruschke v. Nord Chicago Schuetzen Verein*, 145 Ill. 433. An objection that the bill of review does not set out the original bill and proceedings in full is waived when the defendant stipulates that all the proceedings are substantially set forth, and that record proof of them need not be made: *Lewis v. Pleasants*, 143 Ill. 271.

9. Bill of Review for Errors Apparent lies of Right.—A bill of review will lie as of right for errors of law apparent upon the face of the record. The leave of the court need not be asked: *Smyth v. Fitzsimmons*, 97 Ala. 451; *Griggs v. Gear*, 8 Ill. 2; *Jackson v. Jackson*, 144 Ill. 274; *Axtell v. Pulsifer*, 155 Ill. 141; *Cook v. French*, 96 Mich. 525; *Murray v. Ingersoll*, 100 Mich. 286; *Denson v. Denson*, 33 Miss. 560; *Buckingham v. Corning*, 29 N. J. Eq. 238; *Jones v. Fayerweather*, 46 N. J. Eq. 237; *Priestley's Appeal*, 127 Pa. 420; *Lafferty v. Lafferty*, (W. Va.) 26 S. E. Rep. 262; and if the bill is erroneously stricken off because of a failure to ask leave, it will be reinstated on appeal, unless the appellant was not really prejudiced by such action—*i. e.*, if he would have taken nothing by his bill in any case: *Wood v. Wood*, 59 Ark. 441. In California and Texas, however, it has been held that a bill of review will not lie for this cause, but that the only remedy is by writ of error: *San Francisco Sav. & Loan Soc. v. Thompson*, 34 Cal. 76; *Seguin v. Maverick*, 24 Tex. 526; *Moore v. Perry*, (Tex.) 35 S. W. Rep. 838.

10. Leave to file Bill of Review to Decree Appealed from.—When a decree has been appealed from, and is in the hands of the appellate court, a bill of review should be asked for with leave of that court; and if the decree has once been affirmed and the mandate of the appellate court transmitted to the lower court, a bill of review will not lie for matters of law apparent on

the face of the record. It is to be presumed that the appellate court will correct whatever errors exist, and if it affirms the decree it affords a conclusive presumption against the existence of those alleged; and further, *interest reipublicæ ut sit finis litium*: Ensminger v. Powers, 129 U. S. 302; Kimberly v. Arms, 40 Fed. Rep. 548; Bank v. Taylor, 53 Fed. Rep. 854; Kingsbury v. Buckner, 134 U. S. 650; Rice v. Carey, 4 Ga. 558; Watkins v. Lawton, 69 Ga. 671; Calmes v. Ament, 1 A. K. Marsh. (Ky.) 459; Pinkney v. Jay, 12 Gill & J. (Md.) 69; Dennison v. Goehring, 6 Pa. 402; Haskell v. Raoul, 1 McCord Ch. (S. Car.) 22; Cox v. Breedlove, 2 Yerg. (Tenn.) 499; White v. Atkinson, 2 Call, (Va.) 316; Price v. Campbell, 5 Call, (Va.) 115; McCall v. Graham, 1 H. & M. (Va.) 13; Campbell v. Price, 3 Munf. (Va.) 227; Bk. of Va. v. Craig, 6 Leigh, (Va.) 399; Towner v. Lane, 9 Leigh, (Va.) 262; Western M. & M. Co. v. Va. C. C. Co., 10 W. Va. 250; Newman v. Mollohan, 10 W. Va. 488; Henry v. Davis, 13 W. Va. 230. This rule holds good, though the decree or judgment is affirmed by dismissing the writ of error or appeal for want of proper parties: Rice v. Carey, 4 Ga. 558; or when the writ of error is dismissed because the errors assigned do not specify in what particulars the decree is erroneous: Hall v. Huff, 76 Ga. 337; but the mere taking of an appeal, which is not prosecuted, will not prevent a review: State v. Kolsem, 130 Ind. 434; and when a bill of review is made a matter of right by statute, it will lie after affirmance: Parker's Appeal, 61 Pa. 478.

11. Bill of Review for Newly-discovered Evidence not of Right.—A bill of review for newly-discovered evidence does not lie as of right, but only in the discretion of the court, which should not grant it if any equities of third persons will be prejudiced thereby: Gould v. Tancred, 2 Atk. 534; Wilson v. Webb, 2 Cox Ch. 3; Perry v. Phelps, 17 Ves. 173; Hungate v. Gascoyne, 2 Ph. 25; Dexter v. Arnold, 5 Mason, (U. S.) 303; Wood v. Mann, 2 Sumn. (U. S.) 316; Beard v. Burts, 95 U. S. 434; Ricker v. Powell, 100 U. S. 104; Craig v. Smith, 100 U. S. 226; Griggs v. Gear, 8 Ill. 2; Hood v. Green, 42 Ill. App. 664; Schaefer v. Wunderle, 154 Ill. 577; Cole v. Burnap, (Ill.) 45 N. E. Rep. 969; Brewer v. Bowman, 3 J. J. Marsh. (Ky.) 492; Vaughan v. Cutrer, 49 Miss. 782; Harris v. Edmondson,

3 Tenn. Ch. 211; *Brainard v. Morse*, 47 Vt. 320; *Carter v. Allan*, 21 Gratt. (Va.) 241; *Nichols v. Nichols*, 8 W. Va. 174. Before filing such a bill, therefore, the leave of the court must be asked. If this is not done it will be stricken from the files on motion; and if the bill does not state that leave has been asked it will be demurrable: *Moore v. Moore*, 2 Ves. Sen. 596; *Henderson v. Cook*, 4 Drew. 306; *Hodson v. Ball*, 1 Ph. 177; *Tommey v. White*, 1 H. L. Cas. 160; *Connor v. Reeves*, 16 Ir. Ch. Rep. 398; *Webster v. Diamond*, 36 Ark. 532; *Pendleton v. Fay*, 3 Paige Ch. (N. Y.) 204; *Hamill's Appeal*, 88 Pa. 363; *Knight v. Atkisson*, 2 Tenn. Ch. 384; *Heermans v. Montague*, (Va.) 20 S. E. Rep. 899.

12. The Matter Alleged must be New, Material and Relevant.—In order to found a bill of review for the discovery of new matter it must appear that the matter is new; the mere reswearing of witnesses to the original suit: *Head v. Head*, 3 A. K. Marsh. (Ky.) 112; *Finley v. Tyler*, 3 T. B. Mon. (Ky.) 400; *Respass v. McClanahan*, Hard. (Ky.) 342; or evidence which only goes to the impeaching of a witness to that suit: *Southard v. Russell*, 16 How. 547; *Boyden v. Reed*, 55 Ill. 458; *Barrett v. Belshe*, 4 Bibb, (Ky.) 348; unless it proves that they perjured themselves: *Harris v. Cornell*, 80 Ill. 54; *Brewer v. Bowman*, 3 J. J. Marsh. (Ky.) 492; is not sufficient. So, a change by the Supreme Court of its ruling on a question of law and fact: *Tilghman v. Werk*, 39 Fed. Rep. 680; or the setting aside of a void decree: *Vetterlein v. Barker*, 45 Fed. Rep. 741; is not new matter within the rule. Further, the new matter set up must be material: *Taylor v. Sharp*, 3 P. Wms. 371; *Davis v. Bluck*, 6 Beav. 393; *Jenkins v. Eldredge*, 3 Story, (U. S.) 299; *Irwin v. Meyrose*, 7 Fed. Rep. 533; *Shelton v. Van Kleeck*, 106 U. S. 532; *Todd v. Chipman*, 62 Me. 189; *Hollingsworth v. McDonald*, 2 Harr. & J. (Md.) 230; *Iler v. Routh*, 3 How. (Miss.) 276; *Foy v. Foy*, 25 Miss. 207; *Greenwich Bk. v. Loomis*, 2 Sandf. Ch. (N. Y.) 70; *Simpson v. Downs*, 5 Rich. Eq. (S. Car.) 421; *Long v. Granberry*, 2 Tenn. Ch. 85; *Bledsoe v. Carr*, 10 Yerg. (Tenn.) 55; *Brainard v. Morse*, 47 Vt. 320; *Carter v. Allan*, 21 Gratt. (Va.) 241; *Hatcher v. Hatcher*, 77 Va. 600; *Nichols v. Nichols*, 8 W. Va.

174; *Hill v. Maury*, 21 W. Va. 162; and it must be admissible as evidence, or leave to file the bill will not be granted. Thus, in *Schaefer v. Wunderle*, 154 Ill. 577, the error alleged was an incorrect statement in the pleadings of the residence of the complainant, and the newly-discovered evidence adduced was merely a certificate of acknowledgment of a power of attorney; and leave to file the bill was refused, on the ground that the certificate would not be evidence.

It was originally held in England that no new matter could be set up as ground for review which was not relevant to the particular issues involved in the original bill; but it seems to be now well settled everywhere that such matter may be a good ground for review if it is relevant to the main question in the cause, though it may tend to introduce a new issue: *Partridge v. Usborne*, 5 Russ. 195; *Massie v. Graham*, 3 McLean, (U. S.) 41; *Brewer v. Bowman*, 3 J. J. Marsh. (Ky.) 492. But matter which would tend to create wholly new issues cannot be set up in review by way of amendment to the original bill: *Snyder v. Botkin*, 37 W. Va. 355.

13. The Matter Alleged must have been Unknown at the Time of the Trial.—It must appear that the new evidence was not known to the party at the time of the hearing of the original bill, and could not have been procured and produced at the hearing with the use of reasonable diligence: *Barrington v. O'Brien*, 2 Ball. & B. 140; *Ord v. Noel*, 6 Madd. 127; *Bingham v. Dawson*, 3 J. & W. 243; *Massie v. Graham*, 3 McLean, (U. S.) 41; *Rubber Co. v. Goodyear*, 9 Wall. 805; *Adler v. Vankirk Land & Const. Co.*, (Ala.) 21 So. Rep. 490; *Woodall v. Moore*, 55 Ark. 22; *Bartlett v. Gregory*, 60 Ark. 453; *Barnes v. Dewey*, 58 Ind. 418; *Robinson v. Sampson*, 26 Me. 11; *Crooker v. Houghton*, 61 Me. 337; *Hughes v. Jones*, 2 Md. Ch. 289; *Whelan v. Cook*, 29 Md. 1; *Wiser v. Blachly*, 2 Johns. Ch. (N. Y.) 488; *Livingston v. Hubbs*, 3 Johns. Ch. (N. Y.) 124; *Barrow v. Rhineland*, 3 Johns. Ch. (N. Y.) 120; *Pendleton v. Fay*, 3 Paige Ch. (N. Y.) 204; *Stevens v. Hey*, 15 Ohio, 313; *Milligan's Appeal*, 82 Pa. 389; *Ex parte Vandersmissen*, 5 Rich. Eq. (S. Car.) 519; *Harris v. Edmondson*, 3 Tenn. Ch. 211; *Burson v. Dosser*, 1 Heisk. (Tenn.) 754; *McDowell v. Morrell*,

5 Lea, (Tenn.) 278; Winston v. Johnson, 2 Munf. (Va.) 305; Hatcher v. Hatcher, 77 Va. 600; Sanders v. Burk, (Va.) 22 S. E. Rep. 516; Nichols v. Nichols, 8 W. Va. 174. Mere negligence or forgetfulness is no ground for review: Ludlow v. Macartney, 2 Bro. P. C. 67. If the party goes on to a hearing after discovering the existence of material evidence, he cannot set up that evidence as ground for review: Hood v. Green, 42 Ill. App. 664; and the knowledge of an agent, solicitor or attorney will be deemed the knowledge of the party, so far as this rule is concerned: Jenkins v. Eldredge, 3 Story, (U. S.) 299; Foy v. Foy, 25 Miss. 207; Greenlee v. McDowell, 4 Ired. Eq. (N. C.) 481. Further, when he knows of the existence of a material document at the time of the hearing, the fact that he searches for it diligently and cannot find it will not be ground for review, if he can prove its contents by parol evidence, but does not do so: Davis Sewing Machine Co. v. Dunbar, 32 W. Va. 335; and the discovery of the whereabouts of a material witness will not entitle to review if the existence and materiality of his evidence was known before: Putnam v. Clark, 36 N. J. Eq. 33. So, if he knows of the existence of the evidence, but goes to trial without it, relying on other facts, he cannot allege it as ground for bill of review: McGuire v. Gallagher, 95 Tenn. 349.

14. The New Matter Alleged must be Convincing.—It must appear that the new matter relied upon would have brought about a different result, if it had been presented at the hearing: Patterson v. Slaughter, Ambl. 292; Bennet v. Lee, 2 Atk. 529; Portsmouth v. Effingham, 1 Ves. Sen. 430; Willan v. Willan, 16 Ves. 72; Young v. Keighly, 16 Ves. 348; Blake v. Foster, 2 Ball. & B. 457; Dyneley v. Hartley, 2 Jur. 229; Hungate v. Gascoyne, 2 Ph. 25; Wason v. Westminster Imp. Comrs., 4 L. T. N. S. 80; *In re Smyth*, 32 L. J. Ch. 779; Hosking v. Terry, 15 Moore P. C. 493; Michael v. Fripp, 18 W. R. 423; Rubber Co. v. Goodyear, 9 Wall. 805; U. S. v. Throckmorton, 98 U. S. 61; Kimberly v. Arms, 40 Fed. Rep. 548; Woodall v. Moore, 55 Ark. 22; Donovan v. Dwyer, 62 Mich. 249; Maddox v. Apperson, 14 Lea, (Tenn.) 596; Douglass v. Stephenson, 75 Va. 747. Evidence which is merely cumulative or corroborative of that given at

the hearing of the original suit is no ground for review: *Caller v. Shields*, 2 Stew. & Port. (Ala.) 417; *McDougald v. Dougherty*, 39 Ala. 409; *Griggs v. Gear*, 8 Ill. 2; *Walker v. Douglas*, 89 Ill. 425; *Head v. Head*, 3 A. K. Marsh. (Ky.) 112; *Iler v. Routh*, 3 How. (Miss.) 276; *Foy v. Foy*, 25 Miss. 207; *Love v. Blewit*, 1 Dev. & B. Eq. (N. C.) 108; *Davis Sewing Machine Co. v. Dunbar*, 32 W. Va. 335.

15. Requisites of Bill of Review for Newly-discovered Evidence.—A petition for a bill of review on the ground of newly-discovered evidence should state all the facts necessary to meet the requirements stated above, (*supra*, § 8,) for the information of the court; should state the names of the witnesses, the substance of the evidence expected from them, its effect on the decree, how and when the complainant first obtained knowledge of their testimony, what means, if any, were used to keep him in ignorance thereof, and also show that he has not been guilty of any negligence in regard thereto: *Dexter v. Arnold*, 5 Mason, (U. S.) 303; *Massie v. Graham*, 3 McLean, (U. S.) 41; *Greer v. Turner*, 47 Ark. 17; *Carter v. Allan*, 21 Gratt. (Va.) 241; *Amiss v. McGinnis*, 12 W. Va. 371. It should be verified by the affidavit of the complainant, and of the witnesses upon whose testimony it is based, if the latter can be procured: *Kern v. Wyatt*, 89 Va. 885; *Nichols v. Nichols*, 8 W. Va. 174; and the affidavit should be positive and certain, not merely on information and belief: *Thomas v. Rawlings*, 34 Beav. 50. *A fortiori*, a verification by counsel on information and belief is not sufficient: *Schaefer v. Wunderle*, 154 Ill. 577. If the bill shows on its face that the evidence relied on is irrelevant and immaterial, it will be dismissed, on motion: *Lorentz v. Lorentz*, 32 W. Va. 556.

16. Bill for Newly-discovered Evidence after Affirmance of Decree.—Whether or not a bill of review for newly-discovered evidence will lie after affirmance of the decree, is as yet unsettled. Some state and the federal courts hold that it will not, unless the decree of the appellate court expressly reserves the right, as such an action would be practically a review of the judgment of the appellate court: *Southard v. Russell*, 16 How. 547; *Franklin Sav. Bk. v. Taylor*, 53 Fed. Rep. 854; *Kinsell v.*

Feldman, 28 Iowa, 497; Jewett *v.* Dringer, (N. J.) 9 Repr. 379; Stafford *v.* Bryan, 2 Paige Ch. (N. Y.) 45; Felty *v.* Calhoon, 147 Pa. 27; others, and with better reason, that it will: Needler *v.* Kendall, Finch, 468; Flower *v.* Lloyd, 6 Ch. D. 297; Singleton *v.* Singleton, 8 B. Mon. (Ky.) 340; Mosher *v.* Mosher, (Mich.) 66 N. W. Rep. 486; Putnam *v.* Clark, 35 N. J. Eq. 145; Haskell *v.* Raoul, 1 McCord Ch. (S. Car.) 22; McCall *v.* Graham, 1 H. & M. (Va.) 13; Connolly *v.* Connolly, (Va.) 9 Repr. 830; Campbell *v.* Campbell, 22 Gratt. (Va.) 649; for it is impossible that the appellate court should be presumed to be aware of the existence of this evidence; and to refuse a review might be the means of perpetrating gross injustice. But in such a case the evidence to warrant a reversal or alteration of the decree must be very strong and convincing: Henry *v.* Davis, 13 W. Va. 230; Davis Sewing Machine Co. *v.* Dunbar, 32 W. Va. 335. In any case, a decree will be reviewed for fraud and mistake, though affirmed on appeal: Reynolds *v.* Reynolds, 88 Va. 149; and in Pennsylvania, under the statute, a bill of review will lie in the orphans' court after affirmance of the decree in the Supreme Court: Parker's Appeal, 61 Pa. 478. When a decree has been reversed on appeal, the question of allowing a review is not a practical one, and will not be discussed: Hoig *v.* Thrap, 84 Ill. 302.

17. Limitation of Bill of Review.—There is no special limitation to the bringing of a bill of review; but after a long acquiescence in a decree, the court will not reverse it, except on very apparent error: Fitton *v.* Macclesfield, 1 Vern. 287; Edwards *v.* Carroll, 2 Bro. P. C. 98; Scarsbrick *v.* Skelmersdale, 4 Y. & Coll. C. C. 78; White *v.* Joyce, 158 U. S. 128; Stockley *v.* Stockley, 93 Mich. 307; and in general, the time for filing a bill of review is regulated by analogy to that limited for bringing a writ of error—*i. e.*, in England, to twenty years after the judgment, and five years after the removal of disability: Smith *v.* Clay, Ambl. 645; Sherrington *v.* Smith, 2 Bro. P. C. 62; Lytton *v.* Lytton, 4 Bro. C. C. 441; Gorman *v.* McCulloch, 5 Bro. P. C. 597; Kelly *v.* Lennon, 1 J. & L. 305; and in the United States, according to the various statutes of the several states, usually five years from the decree and two years after the removal of

disability, unless there are cogent reasons for holding the party bound to act sooner: *Thomas v. Harvie*, 10 Wheat. 146; *Taylor v. Charter Oak Ins. Co.*, 3 McCrary, (U. S.) 484; *McDonald v. Whitney*, 39 Fed. Rep. 466; *Tilghman v. Werk*, 39 Fed. Rep. 680; *Rector v. Fitzgerald*, 59 Fed. Rep. 808; *White v. Joyce*, 158 U. S. 128; *Allen v. Currey*, 41 Cal. 318; *Lyon v. Robbins*, 46 Ill. 276; *Dolton v. Erb*, 53 Ill. 289; *Sloan v. Sloan*, 102 Ill. 581; *Chicago Bdg. Soc. v. Haas*, 111 Ill. 176; *Bell v. Johnson*, 111 Ill. 374; *Allison v. Drake*, 145 Ill. 500; *Martin v. Gilleylen*, 70 Miss. 324; *Boyd v. Vanderkemp*, 1 Barb. Ch. (N. Y.) 273; *Nolan v. Urmston*, 17 Ohio, 170; *Littleton's Appeal*, 93 Pa. 177. When there are several infant parties, therefore, whose interests are inseparable, the limitation runs until two years after the youngest comes of age: *McAnear v. Epperson*, 54 Tex. 220; *Best v. Nix*, 6 Tex. Civ. App. 349. The limitation runs from the entry of the final decree sought to be reviewed, and accordingly, when a decree was rendered in partition proceedings, finding the rights of the parties, ordering a partition, and appointing commissioners to make it, and the suit was then continued from term to term for several years in expectation of the commissioners' report, and at last finally dismissed, the limitation was held to run from the entry of the former decree, not from the dismissal of the suit: *Jackson v. Jackson*, 144 Ill. 274. Further, the time which elapses between a void order vacating a previous order in a foreclosure suit, giving certain intervening parties a lien prior to the mortgage, and an order setting that void order aside, cannot be omitted in computing the time within which a bill might be filed to review the original order for errors apparent, as the party seeking review had no right to rely on the validity of the vacating order, or on the acquiescence of the petitioners therein: *Cent. Trust Co. v. Grant Locomotive Works*, 135 U. S. 207. But if a decree is not final when pronounced the limitation will not begin to run until it becomes final—*i. e.*, in the case of service on absent defendants by publication, not until the expiration of the statutory period allowed them to come in and except: *Beach v. Mosgrove*, 16 Fed. Rep. 305. In Pennsylvania, under the act of October 13, 1840, P. L. (1841) 1, § 1, which provides that bills of review may be granted by the orphans' court for certain causes, within

five years, it has been settled that a limitation of five years is created thereby : George's Appeal, 12 Pa. 260 ; Kinter's Appeal, 62 Pa. 318 ; Jones's Appeals, 99 Pa. 124.

The period of limitation of bills of review for new matter is the same as that for bills of review for error apparent, viz., the same as that for writs of error or appeals: *Tilghman v. Werk*, 39 Fed. Rep. 680 ; *Cole v. Burnap*, (Ill.) 45 N. E. Rep. 969 ; with this exception, that if a petition for a bill of review for newly-discovered evidence shows clearly that it was not discovered until the limitation had run, and satisfactorily explains the failure to discover it sooner, the bill will be allowed : *Myers v. Pickett*, 81 Tex. 53.

Charitable Bequests — “Charitable, Philanthropic or ”—Blank in Will.

IN RE MACDUFF.

MACDUFF *v.* MACDUFF.

(Supreme Court of Judicature—Court of Appeal. June 4, 1896.)

([1896] 2 Ch. 451.)

A bequest of money “for some one or more purposes, charitable, philanthropic or ,” is not bad simply by reason of the existence of the blank, but must be treated as one “for charitable or philanthropic purposes.” Such a bequest, however, is not a good charitable bequest, as there may be philanthropic purposes which are not charitable.

The Rev. John Ross Macduff, D. D., by his will, which was dated July 24, 1889, and divided into paragraphs, described himself as “formerly minister of Sandyford Church and Parish, Glasgow, but now having my domicile in England and residing at Ravensbrook, Chislehurst, Kent,” and declared that to be his will, “retaining the right to alter or modify or cancel any of the provisions thereof, even on my

death-bed, as well as to add any codicil or codicils." The testator next appointed his daughter, Annie Seton Macduff, and two other persons executrix and trustees of his will, and bequeathed to his said daughter all his property and effects of every kind, to enjoy the entire interest therein during her life, with the reservation of several pecuniary legacies and annuities, the amounts whereof were in two or three instances left in blank; and he then left all his property of every description, except what he had thereinbefore specifically disposed of, to his trustees, upon trust to pay or provide for his debts, funeral and testamentary expenses, and the legacies and annuities bequeathed by the will, directing that the trust estate should be held in trust for his said daughter, with power for the trustees, in case her income became narrowed or crippled, to appropriate such sums as they deemed proper from the principal for her use and benefit. The testator then proceeded, in paragraph 7, as follows: "The aforesaid provisions or legacies are to come into immediate, or almost immediate, settlement at my death. The following far more important bequest is for the future, and is retained under the seal of secrecy until my daughter's death, when my aforesaid trustees are empowered to open it. But until that time it is sacredly to be retained by my daughter, Annie S. Macduff, the provisions of the same being contingent on her wishes and other private considerations. It contains the bequest of a considerable sum of money for a purpose or purposes which cannot at present be disclosed, and the destination of which may be altered or modified at her discretion, or, failing her, others, whose names will be engrossed in this special deed." And the testator gave the ultimate residue of his property of every kind absolutely to his said daughter, to be disposed of as she deemed best.

On August 27, 1889, the testator signed a document headed "Special private and contingent bequest embodied at p. 3 (paragraph No. 7) in my will dated July 24, 1889."

This document was in the following terms: "As said private and contingent bequests are not to take effect in my daughter's lifetime, but only come into operation at her death, my two trustees mentioned in aforesaid will and settlement are there empowered to open this document and carry its provisions into effect, with any new specification or alteration that may have been resolved on by my daughter and left in her handwriting at the end of these presents. I, John Ross Macduff, will from my estate the entire sum of £10,000, to be appropriated and allocated for some one or more purposes, charitable, philanthropic or . The precise purpose or purposes I would desire to be named by my daughter, Annie S. Macduff. But should she from any cause fail or be unable to indicate these, I leave the elder surviving sons of my brothers, in co-operation with any others in whose wisdom and experience they can thoroughly rely, to see my wishes carried into effect. I am unable personally to tie myself down to any specific scheme, as many objects supremely claimant to-day may cease to be so after a series of years, while others at present undreamt of may be found urgent." This document was expressed to be "Signed by the said John Ross Macduff, the testator, as and for a special clause and provision made in his will and testament at p. 3, clause 7," and it was duly attested as by law required for testamentary provisions.

The testator died on April 30, 1895, and this document was admitted to probate, together with the will and two subsequent codicils, which are not material.

This was an originating summons taken out by Miss Annie Seton Macduff against the two trustees and the attorney general in order (*inter alia*) to have it determined by the court whether any bequest of £10,000, to take effect on her death, was effectually made by the will and codicils of the testator for any charitable or other purposes.

The summons was heard before STIRLING, J., on January 16, 1896.

Hadley, in support of the summons.—The only question is as to the construction of the special private document which has been admitted to probate together with the will, and I contend that it does not constitute any valid charitable gift.

The bequest is of £10,000 for some one or more “charitable, philanthropic or” unnamed purposes. The choice is not conjunctive, but disjunctive, and the gift is too vague and uncertain to be carried out: *Ellis v. Selby*, 1 My. & Cr. 286, 298, 299. And supposing the purpose left in blank be disregarded and the gift to be treated as one for “charitable or philanthropic” purposes only, it is bad because a “philanthropic” purpose is not necessarily a charitable purpose. A “philanthropic” purpose is equivalent to a “benevolent” purpose, or to a purpose or object of “benevolence and liberality,” which purposes need not be “charitable,” and where a gift for a charitable purpose is coupled with one for a purpose which is not charitable, the whole gift is bad: *James v. Allen*, 3 Meriv. 17; *Morice v. Bishop of Durham*, 10 Ves. 521; *Williams v. Kershaw*, 5 Cl. & F. 111, n.

Whitworth, for the trustees.

Ingle Joyce, for the attorney general.—This is a good charitable gift. A gift to several religious societies would not be invalidated because one of them could not take; and where there are several named purposes it is not enough to invalidate the gift that one should be found to be bad, so long as the whole will shows a charitable intention and object on the part of the testator: *In re White*, [1893] 2 Ch. 41. The language of this will shows forcibly that what the testator contemplated was the general good.

The decisions on the word “benevolent” and “philanthropic” are not synonymous. A gift to an individual might be benevolent. “Philanthropic” implies generality. According to the definitions in the Imperial Dictionary and in Webster’s Dictionary philanthropy is benevolence towards

the whole of mankind. There is no decision as to whether or not a gift for philanthropic purposes is a good charitable gift; but I submit that *prima facie* it is, and that the words "charitable or philanthropic" in the will were used by the testator in their popular sense, and that they do not necessarily show that "philanthropic" means something different from charitable: *Dolan v. Macdermot*, 3 L. R. Ch. 676. The word "philanthropic" was used by the testator to bring in purposes, which, though not charitable in the popular sense of the word, were charitable according to the technical sense in which that word is used in this court, and under this gift the money could be applied for purposes beneficial to the community at large: *Commissioners for Special Purposes of the Income Tax v. Pemsel*, (1891) A. C. 531, 583; *Nightingale v. Goulburn*, 5 Hare, 484, 2 Ph. 594. Then as to the blank space left for the third alternative, that does not make the whole gift void. The court will simply treat it as if there was nothing there, and then, striking out the last "or," the gift will be "for some one or more purposes, charitable or philanthropic." *Prima facie*, all philanthropic purposes are charitable, and "charitable" being the dominant word, the general charitable intent more clearly appears: *Illingworth v. Cooke*, 9 Hare, 37; *Gill v. Bagshaw*, 2 L. R. Eq. 746; *In re Sutton*, 28 Ch. D. 464.

Hadley, in reply.—In *In re White*, [1893] 2 Ch. 41, the word "religious" governed the whole gift. According to Johnson's Dictionary, "philanthropy" is a love of mankind. Here there is a power of selection which might never be exercised; the word "or" and not the word "and" is used, which makes a great difference in reference to the blank, for the testator might have filled up the blank with a purpose neither charitable nor benevolent. The general benefit of mankind without any restriction as to area is too wide, vague and indefinite to be a charitable purpose.

(He referred to *In re Wall*, 42 Ch. D. 510; *In re Nottage*, [1895] 2 Ch. 649; *Goodman v. Mayor of Saltash*, 7 App. Cas. 633, 642; and *In re Christchurch Inclosure Act*, 38 Ch. D. 520.)

Cur. adv. vult.

February 26. STIRLING, J.—I desire to say that this case has been argued and will now be decided by me upon the footing that the statement in the will as to the domicile of the testator was in accordance with the fact. My reason for saying this is that there appears to be a difference between the law of Scotland and the law of England as to charitable gifts, and I propose to deal with the case as being governed by English law. (His Lordship then stated the facts, and continued:)

I think that the gift cannot be held to be bad simply by reason of the existence of the blank. The testator seems to have wished further to consider whether the sum he mentions should be devoted to any purposes other than charitable or philanthropic; he never came to any final determination on the subject; and the will, in my opinion, ought to be read as if it had run thus—"for some one or more purposes, charitable, philanthropic, or of such other nature as I may hereafter name by codicil," and as if the testator then died without making a codicil. The effect of this would be that the sum mentioned would be applicable for charitable or philanthropic purposes only. See *Illingworth v. Cooke*, 9 Hare, 37; *Gill v. Bagshaw*, 2 L. R. Eq. 746.

The question then arises whether a bequest for "charitable or philanthropic purposes" is valid according to the law of England. In order that it may be valid, the purposes as defined by the testator's will must be "charitable" in the technical sense in which that word is used in this court. The contention for the attorney general was that the word "charitable" in the will was not to be understood in the technical but in the popular sense; while the word "philanthropic" was used to designate other purposes which,

though not charitable in the popular sense, are nevertheless such in the technical sense. On the other hand, it was urged that among philanthropic purposes may doubtless be included many which are charitable in the technical sense, but also many which are not.

In *James v. Allen*, 3 Meriv. 17, 19, Sir W. GRANT, M. R., had to consider a bequest for "benevolent purposes." He says: "The question is, what authority would this court have to say that the property must not be applied to purposes however so benevolent, unless they also come within the technical denomination of charitable purposes? If it might, consistently with the will, be applied to other than strictly charitable purposes, the trust is too indefinite for the court to execute." And it was held that the gift was invalid.

In *Kendall v. Granger*, 5 Beav. 300, the bequest was to be applied for, amongst other objects, "encouraging undertakings of general utility." Lord LANGDALE, M. R., there says, 5 Beav. 303: "Now a charitable purpose may very well, I conceive, be a purpose of general utility; but the question, which seems to me to arise in this case, as in the case of a gift to benevolent purposes, is, are all purposes of general utility necessarily such purposes as this court deems to be charitable? I own, that in my opinion, according to the decisions which have taken place in this court, they are not. The words 'general utility' are so large, that they comprehend purposes which are not charitable, and, comprising purposes which are not charitable, the trustees have an option to apply them to purposes which are not charitable, and consequently to divert the trust fund from those purposes which this court is in the habit of considering charitable." Then he says: "I do not venture to say that I am well satisfied with all the decisions that have taken place on this subject. I think that there are other cases, showing perhaps that the court would, in a case where charitable purposes were mentioned, have taken care that

the application should have been made to those purposes; but I do not feel myself at liberty to depart from the decisions which have been made on that subject. Conceiving myself bound by authority, I must declare that this is not a trust which can be carried into effect as a charitable purpose."

I respectfully agree with the concluding observations of Lord LANGDALE, and am not at liberty, any more than he was, to depart from the decisions. The question is whether philanthropic purposes can be effectively distinguished from benevolent purposes or purposes of general utility. "Philanthropic" is, no doubt, a word of narrower meaning than "benevolent." An act may be benevolent if it indicated good-will to a particular individual only; whereas an act cannot be said to be philanthropic unless it indicates good-will to mankind at large. Still it seems to me that the word "philanthropic" is wide enough to comprise purposes which are not charitable in the technical sense, and consequently that the trust declared by the testator cannot be supported.

The attorney general appealed. The appeal came on for hearing on June 4, 1896.

Sir R. E. Webster, Attorney General, and *Ingle Joyce*, for the appellant.—A bequest in the language adopted by the testator in this case shows a deliberate intention on his part to give the sum of £10,000 in question for a charitable purpose. It constitutes a good charitable bequest of that sum, and the addition of the word "philanthropic" cannot be held to invalidate it.

No difficulty is created by reason of the blank left by the testator: *In re White*, [1893] 2 Ch. 41. The only difficulty arises from the use of the word "philanthropic." Now, charity is the dominant idea in the mind of the testator, and as philanthropic purposes embrace a vast number of objects

which are charitable the gift ought not to be held to be bad merely because it might possibly embrace some philanthropic objects which are not charitable according to the technical sense of the word as used in our courts. Assuming the gift to be disjunctive, the popular meaning of the word "philanthropic" is "beneficial to the community at large," and it thus comes within the definition of "charity," given by Lord MACNAGHTEN in *Commissioners for Special Purposes of the Income Tax v. Pemsel*, [1891] A. C. 531, 583 : "How far then, it may be asked, does the popular meaning of the word 'charity' correspond with its legal meaning? 'Charity' in its legal sense comprises four principal divisions : trusts for the relief of poverty ; trusts for the advancement of education ; trusts for the advancement of religion, and trusts for other purposes beneficial to the community, not falling under any of the preceding heads." A similar classification was adopted by Sir SAMUEL ROMILLY in his argument in *Morice v. Bishop of Durham*, 10 Ves. 521, 531. What philanthropic purpose, it may be asked, is not charitable? Lord MACNAGHTEN goes on to point out in the case above referred to that the trusts he last mentioned are not the less charitable in the eye of the law, because incidentally they benefit the rich as well as the poor, as every charity must do so either directly or indirectly. STIRLING, J., has decided against us on a supposed analogy between "philanthropic" purposes and "benevolent purposes," or purposes of general utility, and upon the authority of *Kendall v. Granger*, 5 Beav. 300. But why should philanthropy be mixed up with general utility, which takes one into a different field? The distinction between "benevolent" and "philanthropic" is clear ; and it is recognized by the learned judge that philanthropy is benevolence towards the whole of mankind. The Imperial Dictionary and Webster's Dictionary both give this definition of philanthropy. According to the Century Dictionary, it is synonymous with charity. "Benevolence," on the other hand,

indicates good-will to an individual. In this case it cannot be suggested that the testator had any particular individual in view, for he states his inability to tie himself down to any specific scheme.

In this will, at all events, the word "philanthropic" must be treated as "synonymous" with "charitable," for the testator clearly intended to benefit such philanthropic purposes as were charitable.

(They also made use of the arguments stated in the report of the case before STIRLING, J., and referred to the following additional authorities: *Dolan v. Macdermot*, 3 L. R. Ch. 676; *Gill v. Bagshaw*, 2 L. R. Eq. 746; *Whicker v. Hume*, 7 H. L. C. 124; *Jones v. Williams*, Ambl. 651; *Trustees of British Museum v. White*, 2 S. & S. 594.)

Hadley, for the respondent, Miss Annie Seton Macduff, used the same arguments and cited the same authorities as appear in the report of the case in the court below.

(LINDLEY L. J.—Can you suggest a purpose which would be "philanthropic" without being "charitable"?)

A bequest to a cricket club; a bequest of a picture to be exhibited gratis in a room hired for the purpose; a trust established for the purpose of supplying music as a source of recreation; the opening of a theatre gratis for a non-educational purpose; a gift to the nation of an observatory for the purpose of photographing the spectra of stars, which never can be useful in the sense of forwarding navigation, but merely satisfies the curiosity of cultured people. All these and many more might be mentioned as instances of liberality, and, as I contend, of philanthropy, which is not charity. The giving of pure, unalloyed pleasure to all the world is philanthropic, but not charitable. Philanthropy and benevolence both include charity; but they go further, and include more than mere charitable purposes. "Philanthropic" is a very wide word, and includes many things which are only for the pleasure of the world, and cannot be called charitable. In

the case of *In re Foveaux*, [1895] 2 Ch. 501, 507, a society for the prevention of cruelty to animals was said to be charitable because its object was a part of the moral education of mankind. Building houses for the occupation of persons not actually poor, at a reasonable rent, would be a philanthropic object, but it could not be called charitable. In *In re Nottage*, [1895] 2 Ch. 649, a gift to promote yacht-racing, though beneficial to the public, was held not charitable.

(LOPES, L. J.—Would a gift for the establishment of cricket and recreation grounds be charitable?)

The trust cannot be supported unless the court has authority to compel the trustees to apply the whole fund to purposes which are charitable in the legal sense of the word: *Morice v. Bishop of Durham*, 10 Ves. 521; *Nash v. Morley*, 5 Beav. 177, 182; and purposes “of general utility,” though philanthropic, are not charitable: *Kendall v. Granger*, *Id.* 300. The appellant relies on *In re White*, [1893] 2 Ch. 41, but that case in no way countenances the notion that the gift can be supported if the trustee is at liberty to apply any part of the fund to purposes not charitable. There is only one case very near this, *Browne v. Yeall*, 7 Ves. 50, *n.*, where a gift for the purchase and disposition of books tending to promote the happiness of mankind was held not charitable. Lord ELDON, in *Morice v. Bishop of Durham*, 10 Ves. 534, intimates that on the context of that particular will he should have come to a different conclusion; but plainly he considered that apart from an explanatory context those words did not indicate a charitable purpose. There is no difference for the present purpose between “philanthropic” and “benevolent,” but “benevolence” will not do: *Morice v. Bishop of Durham*, 10 Ves. 521; *James v. Allen*, 3 Meriv. 17; *Williams v. Kershaw*, 5 Cl. & F. 111, *n.*; *In re Jarman’s Estate*, 8 Ch. D. 584. As to the observations of Lord MACNAGHTEN, [1891] A. C. 583, he was only giving a classification of charities under different heads, one of which was purposes of public utility not

coming under any of the former heads; but he never meant to say that every object coming under that head was a charitable object. If public utility necessarily made a gift charitable, it would have been unnecessary in the Statute of Elizabeth to set forth so long a list of charitable objects. The theory of the decisions is that an object in order to be charitable must be so like one of the objects there mentioned as to come within the spirit of the statute. *Dolan v. Macdermot*, 3 L. R. Ch. 676, is rather in my favor than otherwise. The area there was restricted, and that fact is dwelt upon in the judgment. There is no case where a trust for the benefit of all persons rich and poor throughout the United Kingdom has been held charitable, though it may be so if the gift is confined to a limited area. In the case of *In re Wall*, 42 Ch. D. 510, KAY, J., bases his judgment on the trust for "aged people," and affirms the view that "benevolent" does not express charity. Under the terms of this gift Miss Macduff might give the whole fund to purposes not "charitable" according to the legal sense of the word, and the gift is void.

Sir R. E. Webster, Att. Gen., in reply.—Looking at the general meaning of the word "philanthropic" and at its use in this will, it cannot have the extended signification contended for by the respondents. As to *Kendall v. Granger*, 5 Beav. 300, the only point of the judgment is that "purposes of public utility" would include objects not charitable.

(LOPES, L. J.—You make the words "or philanthropic" useless.)

That argument did not prevail in *Dolan v. Macdermot*, 3 L. R. Ch. 676. As to *James v. Allen*, 3 Meriv. 17, it is impossible to say that "benevolent" is not wider than "philanthropic." In *Ellis v. Selby*, 1 My. & Cr. 286, the words "or other purposes" left the application of the fund at large. As to *In re Nottage*, [1895] 2 Ch. 649, the idea of a gift to provide prizes for yachting being charitable is

amusing. The case of cricket and recreation grounds was put by the court. I should say they might be charitable if the trust was so guarded as to come within the Statute of Elizabeth, but not otherwise. The true principle is to take the words and context together and see whether on a fair view the whole purpose is not charitable: *Corporation of Wrexham v. Tamplin*, 28 L. T. N. S. 761. In *Nightingale v. Goulbourn*, 2 Ph. 594, a gift to a member of the government for the benefit of the public was held good. The just conclusion is that the words "charitable, philanthropic or " do not include purposes not charitable, and the gift is good.

LINDLEY, L. J.—We think we shall gain nothing by taking time to consider our judgment in this case, as we have thought over it since it was opened, and the conclusion at which we have arrived is that the judgment of STIRLING, J., is right. The case is a difficult one, the difficulty arising from the language used by a will, of which I will read the important part. (His Lordship here stated the effect of the will, and read the material part of the document of August 27, 1889.)

The question which we have to consider is, What is the effect of the words "purposes charitable, philanthropic or " ? On the one hand, it is said that, notwithstanding the generality of this language, this sum of £10,000 is appropriated for general charitable purposes, and if so, of course a scheme can be directed. On the other hand, it is said, and the learned judge has taken the view, that the clause is too general, too uncertain, and too vague to amount to a valid charitable bequest, and that the disposition of the £10,000 therefore fails.

The first point to be considered is, What is the effect of the blank ? At first I was disposed to think that it made the purpose of the testator too indefinite to be treated as a charitable bequest, or as any bequest at all ; but on recon-

sideration, and on looking into the authorities and observing that there was a similar blank in *In re White*, [1893] 2 Ch. 41, which, to my mind, is nearer to this case than the other two cases in which there were blanks, I have come to the conclusion that the learned judge was right on that point, and that the true construction of this clause is, to put it shortly, that the £10,000 is to be appropriated and allocated for some purpose or purposes charitable or philanthropic. The question, then, is, What is the meaning of these words? The first point to be observed is that there is here nothing definite. It is not a gift to some specific institution or to some specific object with additional words. We have nothing but a direction that the £10,000 is to be appropriated and allocated for some purpose or purposes charitable or philanthropic, with the additional clause that the testator says he is "unable personally to tie himself down to any specific scheme as many objects supremely claimant to-day may cease to be so after a series of years, while others at present undreamt of may be found urgent." That is all we have to guide us. Now, in dealing with bequests framed in general language like this, without any context to help us, what have we to get at in order to hold such a general indeterminate bequest to be valid? We must get at something sufficiently definite to guide the court as to the kind of trust which it has to execute, and that trust must be of the kind called technically a charitable trust. To show that this is the right principle, I will refer to the leading case of *Morice v. Bishop of Durham*, 9 Ves. 399, 10 Ves. 521, the judgment of Lord ELDON in which case is one of the most important upon all questions of charities. Lord ELDON there incidentally remarks (and his remarks were unquestionably true) that this court has taken strong liberties upon the subject of charities; but, notwithstanding the strong liberties it has taken, there are certain principles which have always guided the court. Lord ELDON says, 10 Ves. 539: "As it is a maxim that the

execution of a trust shall be under the control of the court, it must be of such a nature that it can be under that control, so that the administration of it can be reviewed by the court, or, if the trustee dies, the court itself can execute the trust; a trust, therefore, which, in case of mal-administration could be reformed and a due administration directed; and then, unless the subject and the objects can be ascertained, upon principles, familiar in other cases, it must be decided that the court can neither reform mal-administration nor direct a due administration." That is the principle of that case, and has been enunciated or repeated from time to time, as will be found on reference to the cases of *James v. Allen*, 3 Meriv. 17, and *Ellis v. Selby*, 1 My. & Cr. 286. Therefore, when we are dealing with general words, we must consider whether there is such an indication of purpose or of trust that the court, if called upon to execute it, can see what it has to do—can see the limits of its own powers. The words here are "purposes charitable or philanthropic." "Charitable," I suppose, is used in the popular sense. I do not suppose that this gentleman, who was a clergyman, used the word "charitable" in the very wide and indefinite sense in which it is used in courts of equity. Probably not one man in a thousand understands what that sense is; and the sense itself is a very indefinite one, as I shall have occasion to show presently. Then what is the meaning of the word "philanthropic"? He means by that something distinguished from charitable in the ordinary sense; but I cannot put any definite meaning on the word. All I can say is that a philanthropic purpose must be a purpose which indicates good-will to mankind in general. Can anything be looser than that? And here arises the difficulty of which the attorney general has availed himself with great skill. He says, "What philanthropic purpose is not charitable?" My answer is, You are dealing with two words of so vague a meaning that it is extremely difficult to say, but we can

suggest purposes which might be philanthropic and not charitable—purposes indicating good-will to rich men to the exclusion of poor men. Such purposes would be philanthropic in the ordinary acceptance of the word—that is to say, in the wide, loose sense of indicating good-will towards mankind, or a great portion of them; but I do not think they would be charitable. I am quite aware that a trust may be charitable, though not confined to the poor; but I doubt very much whether a trust would be declared to be charitable which excluded the poor. I do not know with anything like certainty what is meant by philanthropic, and, not knowing what is meant by philanthropic, it follows that the trustees of this will could apply this £10,000 to purposes which might or might not be charitable in the technical sense of that expression. If so, this general disposition cannot be upheld as a charitable bequest. On that, again, I return to the case of *Morice v. Bishop of Durham*, 10 Ves. 521, in which Lord ELDON says, 10 Ves. 541: “The question then is entirely, whether this is according to the intention a gift to purposes of charity in general, as understood in this court: such, that this court would have held the bishop bound, and would have compelled him to apply the surplus to such charitable purposes as can be answered only in obedience to decrees, where the gift is to charity, in general: or is it, or may it be according to the intention, to such purposes, going beyond those, partially, or altogether, which the court understands by ‘charitable purposes;’ and if that is the intention, is the gift too indefinite to create an effectual trust, to be here executed? The argument has not denied, nor is it necessary, in order to support this decree, that the person, created the trustee, might give the property to such charitable uses, as this court holds charitable uses within the ordinary meaning. It is not contended, and it is not necessary, to support this decree, to contend, that the trustee might not consistently with the intention, have devoted

every shilling to uses, in that sense charitable, and of course a part of the property. But the true question is, whether, if upon the one hand he might have devoted the whole to purposes, in this sense charitable, he might not equally according to the intention have devoted the whole to purposes benevolent and liberal, and yet not within the meaning of charitable purposes, as this court construes those words; and, if according to the intention it was competent to do so, I do not apprehend, that under any authority upon such words the court could have charged him with maladministration, if he had applied the whole to purposes which, according to the meaning of the testator, are benevolent and liberal: though not acts of that species of benevolence and liberality, which this court in the construction of a will calls charitable acts." I take it that that principle is as sound now as it was when Lord ELDON announced it—he did not announce it for the first time; and certainly there was nothing said or dropped from this court in the case of *In re White*, [1893] 2 Ch. 41, which in any way trenches upon that principle. *In re White*, [1893] 2 Ch. 41, has been referred to as if it authorized the view that this gift might be upheld as a charitable gift even if some of these philanthropic purposes might not be charitable. *In re White*, [1893] 2 Ch. 41, authorizes no such view. It was a curious and difficult case. There was a bequest "to the following religious societies," and then there was a blank. At first sight one would say it would be very difficult to uphold that as a valid charitable bequest; but when the authorities came to be looked into, it was found that it had been decided, not once but several times, that a bequest for religious purposes was a charitable bequest and that this had become a settled rule. Then came the difficulty that this was not even a bequest to religious purposes, but only a bequest to religious societies, and the argument was that the purpose was indefinite. Upon consideration the court came to the conclusion (whether rightly or wrongly does not

matter now) that the bequest to religious societies implied a bequest to religious purposes; and, having got that far, they held that this was a good valid bequest for charitable purposes. That was how that case was decided; but it does not at all warrant the idea that it was competent for the trustees of that fund to apply any part of it to purposes which were not charitable. Then reliance is placed, and very naturally, upon the judgment of Lord MACNAGHTEN in *Commissioners for Special Purposes of the Income Tax v. Pemsel*, [1891] A. C. 531, 583; but, when we look at that, I do not think it helps the attorney general at all. What Lord MACNAGHTEN meant is tolerably plain. He took the classification of charities from the argument of Sir SAMUEL ROMILLY in *Morice v. Bishop of Durham*, 10 Ves. 521, 532, and the passage in Sir SAMUEL ROMILLY's argument runs thus: "There are four objects, within one of which all charity, to be administered in this court, must fall"—that is to say, within one of which they must come; but he does not say everything which comes within any one of them must be a charity; that may be so, or may not be so, but they must all come within one of these four heads: "First, relief of the indigent; in various ways: money, provisions, education, medical assistance, etc.; secondly, the advancement of learning; thirdly, the advancement of religion; and, fourthly, which is the most difficult, the advancement of objects of general public utility." Now Sir SAMUEL ROMILLY did not mean, and I am certain Lord MACNAGHTEN did not mean, to say that every object of public general utility must necessarily be a charity. Some may be, and some may not be. In *Kendall v. Granger*, 5 Beav. 300, where the language was "for encouraging undertakings of general utility," Lord LANGDALE came to the conclusion that that was not a charity, and I am not aware that his decision has ever been overruled or questioned. Now, what Lord MACNAGHTEN said, [1891] A. C. 583, is obviously a paraphrase of the words of Sir SAMUEL ROMILLY, which I

have just read: " ' Charity ' in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads," leaving out those somewhat significant words of Sir SAMUEL ROMILLY as to the fourth head, " which is the most difficult," which showed perfectly plainly that Sir SAMUEL ROMILLY saw, and I do not doubt that Lord MACNAGHTEN saw also, that there might be some purposes of public general utility which might be charitable and some which might not.

In deciding the case we must fall back upon the Statute of Elizabeth, not upon the strict or narrow words of it, but upon what has been called the spirit of it, or the intention of it. As Lord ELDON says, this court has taken great liberties with charities; but the liberty is always restricted by falling back or professing to fall back upon the Statute of Elizabeth.

Now, turning to this particular case, can we fairly get out of these words any direction that this £10,000 is to be applied only to such purposes as the law can say are charitable? My answer is, No, the words are too general and too indefinite. I think the learned judge was perfectly right, and this appeal, therefore, must be dismissed.

LOPES, L. J.—I am of the same opinion. The important words in this will are these: " I, John Ross Macduff, will from my estate the entire sum of £10,000, to be appropriated and allocated for some one or more purposes, charitable, philanthropic or . " I read these words as if he had said " purposes charitable or philanthropic."

Great liberties have been taken with the Statute of Elizabeth, as has been justly said, and a signification attributed to the word " charity " very much larger than ever was intended by that statute. There have been numbers of deci-

sions on the question whether a particular purpose is charitable or not which it is no doubt difficult to reconcile. The difficulty in this case arises from the use of the word "philanthropic"—a word dealt with, as it appears, in no previous decision. It has been argued by the learned attorney general that the word "philanthropic" here is synonymous with "charitable." I cannot adopt that view. It is disjunctive; we must insert the word "or" between charitable and philanthropic. I cannot help thinking that the testator intended to draw a distinction between the word "charitable" and the word "philanthropic." If the will stopped at the word "charitable" there would have been a good charitable gift; but it does not so stop—it has the addition of the word "philanthropic," and that is the word with which we have to deal.

The principle applicable to this case is not in dispute and cannot be in dispute. I adopt the words of Sir WILLIAM GRANT, M. R., in *James v. Allen*, 3 Meriv. 17, 19, where he says: "The whole property might, consistently with the words of the will, have been applied to purposes strictly charitable. But the question is, what authority would this court have to say that the property must not be applied to purposes however benevolent, unless they also come within the technical denomination of charitable purposes? If it might, consistently with the will, be applied to other than strictly charitable purposes, the trust is too indefinite for the court to execute." Looking at those words, I ask myself whether or not this property might not consistently with the will, having regard to the word "philanthropic," be applied to other than strictly charitable purposes, and I feel compelled to answer that question in the affirmative. It has been said that nothing can be suggested—no purpose and no object can be suggested which would come within the meaning of the word "philanthropic" which is not also a charity. If that were so, I think the argument of the attorney general could be maintained; but that is not a

view that I am able to adopt. I think I could suggest many objects which would come within the word "philanthropic," and to which the trustees would be entitled to apply the money, which are not charitable. I will not again allude to recreation grounds and grounds devoted to sport which are not for the poorer classes, but are generally for rich and poor alike. I think that would be a case; but there is an illustration which has occurred to me which seems not to be inapplicable to this case, and it is this—a gift, for instance, to landowners affected by agricultural depression and whose incomes are reduced to the amount of £300 a year. It appears to me that that is an object which clearly would be philanthropic, but at the same time would not be charitable. I come, therefore, to the conclusion that the words used in this will are too wide and too indefinite to support the gift; and I am of opinion that the judgment of STIRLING, J., was right.

RIGBY, L. J.—I am of the same opinion. With reference to the blank I have very little to say; but I am inclined to think that the proper way of looking at it is this: that where a man leaves a blank in a will, and does not choose to fill it up at the time when he executes it, it must be taken that he has deliberately determined not to fill it up, and has left the courts to deal with the construction of the instrument as it is found, and that it cannot be properly suggested that he intended to do what we all know would be a perfectly useless thing, namely, to fill up the blank at some time after execution. I treat this as a gift to charitable or philanthropic purposes.

Now the cases with regard to charities are innumerable; but in the case of charities, as in all other cases, precedents are only useful in so far as they enable us to deduce a principle. No previous will can be treated properly as a precedent for another which is expressed in different language, and no decision on the precise words of a former will can

as a general rule be of the least service in guiding the court as to the construction of other words. Unless you can get a principle from a case which is applicable generally to other cases, the precedent is of little use. What principles do we find that are applicable to the present case? First of all, a bequest upon trust must be sufficiently certain to enable the court to superintend and give effect to the trust according to its terms. That is a general principle that applies to all bequests, whether charitable or not; they must be sufficiently definite to enable the court to carry the trusts into effect. Then how do charity cases differ from general cases? As it appears to me, in this respect only—that when you get the idea of charity properly expressed in a will you have a standard to go by, and one that has been adopted now for centuries—that is to say, a standard afforded by the preamble to the Statute of Elizabeth, which deals with certain things specifically as instances of existing charities, and from which by analogy you can deduce that certain other matters are also to be treated as charitable. But before you can apply that rule you must find the idea of charity sufficiently expressed in the will, and it is not a good charitable gift if there is any alternative (I am now talking of substantial matters) allowed to trustees as to whether the purposes to which they apply the property which is devised to them are to be charitable or something else. If there is an alternative the general rule comes in, that this is a matter too indefinite for the court to give effect to it.

Now what is the present case? It is a gift to charitable or philanthropic purposes. I am bound to say that I do not think it is very different from a gift for philanthropic purposes. There may be an argument that, “philanthropic” being joined with “charitable,” the philanthropic purposes must also be charitable; but, then, there is also another argument that as philanthropic purposes are distinguished from charitable purposes by “or,” that shows

that philanthropic purposes are something different from charitable purposes. I think the one argument may be set off against the other, and that we get very little assistance from the fact that there is the word "charitable" used along with the word "philanthropic." Now suppose the word "philanthropic" stood alone. No court has defined that word, and if we try now to define it, I confess myself unable to do so—at any rate, in any sense which would show that the definition meant the same thing as charitable. I do not wish to attempt any very precise illustration, but I am inclined to think that a very general illustration may be of service, and I can suppose the case of a person saying something to this effect: "The ordinary objects of charity are in my mind sufficiently provided for; but I regard the position of the well-to-do, or moderately well-to-do, classes as one also requiring consideration, and I leave my residue to trustees in order that they may in their discretion do something towards advancing the happiness and the position in life of those who are not really objects of charity, but who may be made happier, and in some sense better, than they now are with such incomes as they possess." I doubt whether any one could say that that was not a philanthropic intention—a very wide desire to improve the position of a large class of persons. Philanthropic I should think it was—charitable I feel pretty certain it would not be; and so we get to the conclusion that the word "philanthropy" may include, not cases of a totally exceptional character, but cases of a very wide class, indeed, and numerous cases which would be within the popular meaning of philanthropic, and would have nothing to do with charity. That appears to me sufficient to decide the case.

I will not examine the authorities at length, but will refer to one or two of them, as showing that the matter has come under the consideration of learned judges, and that the decisions have been in accordance with what I conceive to be the principle which I have endeavored to express.

There is the case of *Kendall v. Granger*, 5 Beav. 300, which included purposes of general utility; and Lord LANGDALE, a great authority in cases of this kind, thought that there were or might be purposes of general utility which were not charitable purposes. I see no reason to doubt the soundness of that view. I do not know that that case has ever been doubted. I will take the case to which, I think, Mr. Hadley very properly referred us, notwithstanding the doubts which have been thrown upon the construction of that particular will—I mean *Browne v. Yeall*, 7 Ves. 50, *n*. That appears to be a case in which the question, as considered by Lord THURLOW, was this, whether a gift for the purchasing and proper disposition of books for promoting the happiness of mankind was sufficiently definite; and Lord THURLOW, as explained by Lord ELDON, came to the conclusion that a gift of that kind was not sufficiently definite to be capable of being administered as a charitable gift. True it is that in that will there were words which I should have thought gave a limitation to the words “happiness of mankind,” and that is what I understand to have been the view taken by Lord ELDON. He said, 10 Ves. 539, that he entertained doubt, not of the principle upon which the case was decided, but whether it was well applied in that instance, for that it was not a strained construction to hold that the happiness of mankind intended was that which was to be promoted by the circulation of religious and virtuous learning. I am inclined to think that the view of Lord ELDON is preferable to the view of Lord THURLOW; but that is unimportant. It was on the question whether the words “happiness of mankind” were sufficiently definite that Lord THURLOW decided the case; and I do not gather that Lord ELDON or Sir WILLIAM GRANT would have differed if there had been nothing in the will to confine those words. The promotion of the happiness of mankind is undoubtedly a philanthropic purpose; and I think Mr. Hadley was right in saying—

so far, at any rate, as the cases have been brought before us—that the expression “for promoting the happiness of mankind” is nearer in its meaning to that of the word “philanthropic” than any other expression dealt with in the cases.

There is one other case to which I will refer—*Whicker v. Hume*, 7 H. L. C. 124—and in doing so I will refer also to the unreported case of *President of the United States of America v. Drummond*, Rolls, May 12, 1838, which is mentioned in *Whicker v. Hume*, 7 H. L. C. 155. I say nothing about the wide extent of the gift in *Whicker v. Hume*, 7 H. L. C. 124, because there is no doubt now that the extensive nature of the gift as regards the range of the objects, is no objection to it; but the gift was for advancement of education and learning, and the objection was taken by counsel, who were impeaching the validity of the gift, that education is no doubt a charitable purpose within the Statute of Elizabeth, but learning is not—that is to say, that the promotion of abstract learning would not be a charitable purpose. That was dealt with by Lord CHELMSFORD and Lord CRANWORTH, and both of them point out that, reading the word “learning” as you find it in that will in connection with education, it must be taken as equivalent to teaching, and, therefore, as a certain branch of education; and I rather gather from their judgments and from the pains which they take to draw out and to elucidate the meaning of the word “learning” in that will, that if they could not have put that interpretation upon it they would have doubted, at any rate, as to whether the advancement of learning as an abstract matter would be a charity at all. The Lord Chancellor, Lord CHELMSFORD, goes with pains into the matter, and deals with the word “learning,” and he says—7 H. L. C. 155—that the word in that will was used in the sense of teaching and instruction, “and, in that sense, it appears to me,” he says, “that the case which was cited by the respondents, and which is printed in the respondent’s case, of the

President of the United States of America *v.* Drummond, Rolls, May 12, 1838, may be applicable, where Lord LANGDALE decided, that a gift to the United States of America, to found, at Washington, under the name of the 'Smithsonian Institution, an establishment for the increase of knowledge among men,' was a valid charity." The Lords evidently doubted whether a gift for the increase of knowledge would be a good charitable gift, unless it was understood to mean a gift for teaching and education. Yet the increase of knowledge would unquestionably in these days be taken to be a purpose of general utility, and the doubt of the noble Lords appears to me to be strongly in favor of the view taken by Lord LANGDALE that "purposes of general utility" will not make a good charitable gift.

I have only now to deal with the supposed difficulty arising from the judgment of Lord MACNAGHTEN, and I think it is altogether illogical to ascribe to Lord MACNAGHTEN what is ascribed. He says cases of charity may be divided into four classes, and one of them is "trusts for purposes beneficial to the community." You inquire what the divisions of charities are, and you come to the conclusion that there is one miscellaneous set of charities which can be classed under that head; but to deduce from that the notion that every purpose of general use to the community must be a charity is just about as logical as to draw from a statement in the report of an insurance society that "persons insured with us may be divided into men, women and children," the deduction that every man, every woman, and every child is insured in that society.

I have only one word to say about the case of *In re White*, [1893] 2 Ch. 41. The court was there constrained by the authorities to say that religious purposes were all charitable; and, although it was suggested that in the case of *Cocks v. Manners*, 12 L. R. Eq. 574, it had been shown

that a gift to a particular religious society in the terms in which it was given was not a charity; that to my mind makes no difficulty, because, as far as I know, and for the purposes, at any rate, of this case, I think it is true, when you class charities under the heads "gifts to the poor, trusts for the advancement of education, trusts for the advancement of religion," that does not mean that in every conceivable case where you can bring a gift under those general words such gift is necessarily a charity. It means as in the case of "for the general benefit of the community," that these are heads under which valid charities may be arranged. No one will suggest, for instance, to take only one illustration, that the education of pickpockets in a thieves' kitchen to make them fit for their profession is a charity. It must be education of a particular kind; and when it is a gift to a religious society you may in the same way say, "Yes, but the gift is not necessarily made a charitable gift by the circumstance that it is given to a religious society, for there may be, as in *Cocks v. Manners*, 12 L. R. Eq. 574, a religious society which does not attempt to promote religion." The particular convent in that case was a set of religious people who met together, but who abstained even from good works as regards the outside public, and they did not attempt to proselytize or even to attend to the sick and to the poor, and it was held that the gift to such a society could not be called a charity. It was only a gift to particular men and women who happened at the particular moment to form part of it. I do not consider that the case of *In re White*, [1893] 2 Ch. 41, laid down any new law, and I do not think that Lord MACNAGHTEN'S classification of charities lays down any new law whatever; and that being so, I think that the cases which show that you must have words sufficiently defining the testator's meaning, and sufficiently showing that it is a charitable meaning according to the standard supplied by the Statute of Elizabeth, and by the analogies to that statute, still prevail. In my mind the

word "philanthropic" is too wide, and the judgment of STIRLING, J., must be affirmed.

The costs of the respondents were ordered to be paid out of the estate as in *In re Rymer*, [1895] 1 Ch. 19, 34, it being admitted on all hands that the attorney general could not be ordered to pay them.

CHARITABLE TRUSTS.

1. **What Trusts are Charitable.**—The subject of charitable trusts has been treated at length in the former volumes of this series: Vol. 1, p. 119 *et seq.*; Vol. 2, pp. 9, 47, 62 *et seq.*; but since the publication of those volumes a number of important cases on this general topic have been decided, which are included in this note. Among such gifts are: 1. Gifts for the relief of poverty: such as a gift of residuary personal estate to the poor and the service of God: *In re Darling*, [1896] 1 Ch. 50; and a gift of the remainder of an estate to invest the same in trust, and pay the income thereof "amongst respectable single women of good character above the age of sixty years:" *In re Dudgeon*, 74 L. T. N. S. 613. So, a beneficial society formed to provide a fund for sick and distressed members, their widows and children, and to receive voluntary donations, is a charity, when the rules show that poverty is a necessary ingredient in the qualification of applicants for the benefits of the society: *In re Buck*, [1896] 2 Ch. 727; but a society formed for the sole purpose of raising a fund to provide annuities for the widows of deceased members of the society, irrespective of their pecuniary position, by the subscriptions of its members, and the fines and forfeitures imposed by its rules, is not a charity, and cannot be applied *cy près*: *Cunnack v. Edwards*, [1896] 2 Ch. 679. 2. Gifts for purposes of education: such as a bequest to a state "to constitute a perpetual school fund:" *Bedford v. Bedford*, (Ky.) 35 S. W. Rep. 926; a gift for the education of indigent orphan children: *Sawtelle v. Witham*, (Wis.) 69 N. W. Rep. 72; a gift for the education of "poor mutes:" *North Carolina School for the Deaf and Dumb v. North Carolina Inst. for*

Deaf, Dumb and Blind, 117 N. C. 164; a trust to found an astronomical observatory: *Spence v. Widney*, (Cal.) 46 Pac. Rep. 463; and an arrangement by which several persons associated themselves into an organization known as the "Powell's Valley Academy," which was afterwards incorporated, and conducted without regard to the original organizers: *State v. Ausmus*, (Tenn.) 35 S. W. Rep. 1021. So, the bequest of a fund in trust for the education of the poor children in a certain district is valid, though the free education of all poor children in the state is provided for by law: *Green v. Blackwell*, (N. J.) 35 Atl. Rep. 375; *In re John's Will*, (Oreg.) 47 Pac. Rep. 341. 3. Gifts for religious purposes: such as a legacy to a missionary society: *In re Isbell's Estate*, 1 App. Div. (N. Y.) 158. But a bequest to a church, "to be used in solemn masses for the repose of my soul," does not create a charitable use: *Festorazzi v. St. Joseph's Catholic Church of Mobile*, 104 Ala. 327. 4. Gifts for public purposes: such as a grant of lands to a county "for the erecting thereon of a court-house for the public use and service:" *Stuart v. City of Easton*, 74 Fed Rep. 854; a bequest to a city for the erection of a drinking fountain: *In re Crane's Will*, 42 N. Y. Suppl. 904; and a bequest of a sum of money to erect a monument as a memorial to the testator and construct a play-house and play-ground for children in a public park: *In re Smith's Estate*, 5 D. R. (Pa.) 327.

2. Requisites of a Charitable Gift.—It is of the essence of a charitable bequest that the beneficiaries should be designated as a class only, leaving the numbers and individuals to be determined by the trustees who administer it: *People v. Cogswell*, (Cal.) 45 Pac. Rep. 270; and therefore such a bequest will not be invalidated by the fact that the beneficiaries are indefinite in number: *Guilfoil v. Arthur*, 158 Ill. 600; *Bedford v. Bedford*, (Ky.) 35 S. W. Rep. 926; *Sawtelle v. Witham*, (Wis.) 69 N. W. Rep. 72. But there must be a definite class of beneficiaries who can enforce the trust created by the bequest, and if there is none such, it will fail: *Butler v. Trustees*, 92 Hun, (N. Y.) 96; and if the disposition of the fund rests absolutely in the discretion of the trustee, none of those designated as beneficiaries can enforce it, and the trust fails: *People v. Powers*, 147 N. Y.

104, reversing 29 N. Y. Suppl. 950. The subject of the gift must also be certain; if it is indefinite, the gift cannot be enforced: *Albery v. Sessions*, 2 Ohio N. P. 237. Thus, a gift by will of property in trust for an unincorporated church, for the support of the ministry, repairs of the church, or "other benevolent objects as may be designated from time to time by the said Union Church," is invalid for indefiniteness in the objects of the trust: *Jones v. Green*, (Tenn.) 36 S. W. Rep. 729. But a devise to a Roman Catholic bishop, "to be by him used for the Roman Catholic charitable institutions in his diocese," sufficiently designates the purpose of the gift: *Tichenor v. Brewer*, (Ky.) 33 S. W. Rep. 86; and the same is true of a devise of land to trustees, with power of sale, and authority to pay the proceeds to the vestry of St. Mary's Church, "with direction that the money received by the vestry should be applied to the maintenance of its parish school:" *Hanson v. Little Sisters of the Poor*, 79 Md. 434.

- 3. What are Charitable Institutions.**—A hospitable incorporated under a special act to furnish medical treatment and care for the sick, without capital stock, and from which its members derive no profit, is a charitable corporation: *Hearns v. Waterbury Hospital*, 66 Conn. 98; but since the purposes of the Young Men's Christian Association are social as well as charitable and include the giving of lectures and other entertainments for the benefit of its members, the providing of a gymnasium for promoting their health, and the sale of food at a lunch counter, the association is not a public charitable corporation, and hence is not exempt from liability for negligence in the construction of a floor of its building: *Chapin v. Holyoke Young Men's Christian Assn.*, 165 Mass. 280. Further, a bequest in trust for "charitable and benevolent institutions," includes only such as are both charitable and benevolent: *People v. Powers*, 147 N. Y. 104; and while an incorporated asylum for the aged and infirm under the control of the Church of England, is within the terms of a bequest to "public Protestant charities;" a college whose young men are instructed in the higher branches of learning, and are entitled to receive a free general and theological education, if they intend to enter the
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Presbyterian ministry, is not within such a bequest: *Ross v. Ross*, 25 Can. S. C. R. 307.

4. Perpetuities—*Cy près*.—It is generally held that the rule against perpetuities does not apply to gifts to charitable uses: *Mills v. Davison*, (N. J.) 35 Atl. Rep. 1072. Accordingly, a charitable trust is not rendered invalid by the fact that the will creating it provides for the appointment of trustees fifteen years after the testator's death, the property in the meantime being given in trust to the executors: *In re John's Will*, (Oreg.) 47 Pac. Rep. 341; and when property is conveyed in trust for a certain church parish, a limitation that the property shall be held in trust for another church parish, on the beneficiary ceasing to exist in union with the diocese, is valid: *Parish of Christ Church v. Trustees*, 67 Conn. 554. But it has been held in Wisconsin, that a devise of lands to a city, to be used as a location for a home for the aged and poor, and a certain other tract to be used as a driving park and agricultural grounds, was void under Rev. Stat. Wis. §§ 2038, 2039, prohibiting the suspension of the power of alienation beyond two lives in being, because the city was not a "charitable corporation," within the act: *Beurhaus v. City of Watertown*, (Wis.) 69 N. W. Rep. 986. The surplus of a fire fund contributed to relieve the suffering caused by a fire in a town, which, after its purpose has been accomplished, cannot be returned to the donors, since they are unknown, should be applied to the repair of the losses caused by the fire, and not to the support of the town poor: *Doyle v. Whalen*, 87 Me. 414. A trust created by conveyance of land to three persons, as trustees of an incorporated association for the mutual aid of its members, with *habendum* to them "and their successors in office, forever, for the sole use and benefit of [the association,] for a burial ground, and for no other purpose whatever," even if a charitable trust, is not for such a general charitable purpose as can be executed *cy près*, and it will end, at the latest, when the land ceases to be used as a burial ground, and the association is dissolved; upon the termination of this trust a resulting trust arises to the grantor and his heirs, and the trustees or their heirs hold the legal title to the land charged with that resulting trust; and the estate so resulting to the grantor and his heirs,

since it does not arise under the grant, but by reason of the failure thereof, is not within the rule against perpetuities: *Hopkins v. Grimshaw*, 17 Sup. Ct. Rep. 401.

Contribution — Co-sureties — Indorsers of Promissory Note.

**MERCHANTS' NATIONAL BANK v. McANULTY
ET AL.**

(Supreme Court of Texas. January 27, 1896.)

(33 S. W. Rep. 963; reversing 31 S. W. Rep. 1091, 32 S. W. Rep. 376.)

Findings on conflicting evidence will not, on appeal, be disturbed.

An obligor in a note who pays a sum, in excess of his *pro rata* share, to the obligee, in consideration of his full discharge, is entitled to contribution, from each of his co-obligors, of their *pro rata* share of the excess so paid.

Error to Court of Civil Appeals of Second Supreme Judicial District.

Action by the Merchants' National Bank against R. E. McAnulty and others, as indorsers of an original note and makers of two notes in renewal thereof; defendant McAnulty having executed only one of the renewal notes. Plaintiff, on payment, by defendant Swasey, of a sum in excess of his share, discharged him from all liability. From so much of a judgment of the court of civil appeals (31 S. W. Rep. 1091, 32 S. W. Rep. 376,) as reversed a judgment in his favor against his co-defendants for contribution, defendant Swasey brings error; and from so much thereof as reversed a judgment in their favor against plaintiff, and entered judgment in its favor against them, part of the other

defendants bring error. As to defendant Swasey, reversed; as to other defendants, affirmed.

John W. Wray, for plaintiff in error Taylor.

Ross & Terrell, for plaintiffs in error Roche and another.

A. M. Carter, for plaintiff in error Swasey.

Wynne, McCart & Booty, for defendant in error.

BROWN, J.—The Merchants' National Bank held a note, executed by the Ryland Gold Mining Company, dated December 10, 1890, for the sum of \$28,438.50, which was indorsed by C. J. Swasey, E. W. Taylor, A. B. Smith, W. F. Lake, A. M. Britton, Thomas Roche and R. E. McAnulty. At the time this note became due the bank was unwilling to renew it, and two notes were given in lieu thereof, dated March 13, 1891, one for \$21,080.08, signed by all of said parties, and another for \$8,240, signed by all of the parties except R. E. McAnulty, who refused to sign the latter note. McAnulty signed the first note for \$21,080.08, and delivered it to A. B. Smith, cashier of the bank, with the understanding that it was not to be delivered to the bank nor become effective until it was signed by Sallie Huffman. Sallie Huffman did not sign the note, but Smith delivered it, and it became assets of the bank. The two last notes described were to become due four months after date, and to bear interest from date at twelve per cent. per annum, and, in case they were placed in the hands of an attorney for collection, ten per cent. attorney's fees to be added. Suits were filed in the district court of Tarrant county by the bank upon each of said notes against all the makers thereof. Thomas Roche having died, J. J. Roche was appointed administrator and made a party defendant. The two suits were consolidated into one, constituting this cause. After the filing of the suits stated above, Martin Casey paid to the bank, on behalf of C. J. Swasey, in cash and promissory notes accepted by the bank, the sum of \$22,500, the bank agreeing at the time

to discharge Swasey from any further liability to it upon the two notes embraced in that suit, and another note, executed by the same parties, except Mr. McAnulty, for the sum of \$23,867.50. The sum of \$12,298 of the money paid by Swasey was credited upon the two notes embraced in this suit. Swasey pleaded his discharge, and the other defendants likewise set up the discharge of Swasey, claiming that it had the effect to discharge them also. R. E. McAnulty pleaded that he signed the two notes sued upon with the understanding that they were not to become effective, as against him, until signed by Sallie Huffman, which had not been done, and that therefore he was not bound on the said notes. The bank replied, setting up the fact that the two notes were given in lieu of the note above described, made by the Ryland Gold Mining Company, and indorsed by McAnulty and the other defendants, and prayed that, in case McAnulty was held not to be bound upon the notes in suit, then that it might recover against him upon the original note. The court of civil appeals found that, at the time the bank discharged Swasey, it was not intended by the parties that the other obligors upon the said note should be discharged, and held that the discharge of Swasey did not operate to discharge his co-obligors. The trial court decided that Swasey was discharged by the bank, and that his discharge had the effect to discharge the other defendants from liability upon the notes in suit, and entered judgment against the bank in favor of all the defendants. The payment by Swasey to the bank was made December 20, 1892, at which time there was due upon the notes sued on the sum of \$39,131.32, principal, interest and attorney's fees. The credit placed upon these notes amounted to \$12,298. There were seven of the defendants jointly and severally bound upon the said notes, and the *pro rata* part of each was \$5,590.19. The amount paid by C. J. Swasey, in excess of the proportion chargeable to him, as between the defendants, was \$6,707.81. This excess, being divided *pro rata* between

the other six defendants, would give the sum of \$1,117.97 to each. The court below entered judgment in favor of C. J. Swasey against each of his co-defendants for the sum of \$1,756.95, with twelve per cent. interest per annum from December 20, 1892. The court of civil appeals reversed the judgment of the district court, and rendered judgment in favor of the bank against all of the defendants except C. J. Swasey. It held McAnulty not bound upon the notes in suit, but that he was bound upon the original note for which they were given, and entered judgment against him for the amount of that note and interest, less the payment made by Swasey for \$12,298. Thus, practically, McAnulty was held bound equally with his co-defendants. The court of civil appeals reversed the judgment of the district court, rendered in favor of C. J. Swasey against his co-defendants, and entered judgment that Swasey take nothing upon his plea over against his co-defendants.

The plaintiffs in error, Taylor and Roche, claim that there was no testimony to sustain the finding of the court of civil appeals that the bank, when it discharged C. J. Swasey, reserved its right to recover against the other makers of the said notes. Upon examination of the facts, we think that the court was justified by the testimony in its conclusion of fact complained of, and it is unnecessary for us to further discuss the matter, since the existence of any testimony to sustain the conclusion renders it final so far as this court is concerned.

Taylor and Roche present, in their petition for writ of error, in a number of propositions, substantially one question for our consideration, which is, did the discharge of C. J. Swasey by the Merchants' National Bank, under the facts and circumstances found by the court of civil appeals, operate to discharge the co-obligors of the said Swasey? The opinion of the court of civil appeals, by Chief Justice TARLTON, so clearly states the law applicable to the facts of this case that it is unnecessary for us to enter into any dis-

cussion of the matter. We therefore simply approve the judgment of the court of civil appeals on that question.

C. J. Swasey applied to this court for a writ of error, assigning as ground of error, the action of the court of civil appeals in denying to him the right of contribution as against his co-defendants, who were jointly and severally bound with him upon the notes on which he made the payments stated herein. It is a general and familiar rule of law that, when two or more persons enter into a contract for the payment of money to a third person, the law at the same time raises an implied obligation, as between the obligors in such contract, that each will bear his proportional part of the burdens of the contract, and, in case one of them should discharge all of the contract, or pay more than his proportional part, the others will contribute equally to indemnify him for the payment of any sum in excess of his proportional part thereof: *Faires v. Cockrill*, (Tex. Sup.) 31 S. W. Rep. 190. In the case last cited we carefully examined this subject, and cited the authorities. We therefore refer to that case and the authorities cited therein to sustain the proposition stated. If the bank had not discharged Swasey, upon the payment made by him, he would undoubtedly have been entitled to recover, against each of his co-obligors, the proportional part of such obligor of the sum that Swasey paid to the bank in excess of the *pro rata* of the said Swasey. It is claimed that, because Swasey was discharged by the bank, he cannot recover from the other defendants. If the co-obligors of Swasey, or any one of them, had paid upon the said debt, after Swasey's discharge, a sum greater than that paid by Swasey, and greater in amount than such person should have paid, he could have maintained an action against Swasey for contribution, notwithstanding his discharge; and this right, no doubt, exists, and will continue, in case any one of the defendants, by reason of the insolvency of

the others, should be hereafter compelled to pay more than his proportional part of the said indebtedness: *Boardman v. Paige*, 11 N. H. 431; *Glasscock v. Hamilton*, 62 Tex. 143; 1 White & Tud. Lead. Cas. Eq. pt. 1, p. 169. The obligation between the makers of the notes did not depend upon the written contract, and the payee of the note, the bank, had no interest therein. It could not, by its discharge of Swasey, in any way impair his obligation to his co-obligors: *Boardman v. Paige*, *supra*. If it be true that Swasey's obligation to contribute to the other makers of the notes, in case they, or either of them, should pay an amount in excess of his part thereof, still remains in force after his discharge, how can it be said that the obligation of the other obligors in said contract was affected and destroyed, in so far as it bound them to indemnify Swasey for the sum paid by him for their benefit. By the payment made Swasey discharged the sum of \$6,707.81, for which the other defendants were bound. In other words, he paid, for each of the other defendants, the sum of \$1,117.97. If the discharge of Swasey had operated to absolve him from liability to his co-obligors to make contribution to them, then such discharge would have had the effect to discharge each and all of the makers of said note from liability to the bank. However, since they remained obligated to pay the remainder of the notes, the payment by Swasey, in excess of his proportional part thereof, enured to their benefit; and, upon the principles of law and equity, on which rests the doctrine of contribution, they were bound to reimburse him to the extent of the benefit received by them, and each of them, by reason of the payment made by him. If we were to hold that Swasey was not discharged from his obligation to contribute to his co-obligors in case they should thereafter discharge more than their ratable portion of the note, but that they were each discharged from their obligation to him (Swasey) to make like contribution upon the payments made by him, we would have the anomalous condition of

having destroyed the mutuality of the contract, and preserved its binding effect upon one party alone. This, we think, cannot be sustained, either upon authority or sound reasoning; and we hold that Swasey was entitled to recover against each of his co-defendants the one-sixth part of the sum that he paid upon the said notes in excess of his proportional part thereof.

Swasey's right of recovery was not upon the note, but upon the implied contract which the law raised between the joint promisors; and it was error in the district court to give judgment for twelve per cent. interest upon the amount recovered by Swasey against each of the other defendants. The district court, likewise, gave judgment in favor of Swasey for the one-seventh part of the whole amount paid by him against each of his co-defendants. If all the defendants had been discharged by the discharge of Swasey, the judgment for this amount would have been correct; but as they were not discharged, he was only entitled to recover for the proportional part of the excess of his payment over the amount for which he was liable, with six per cent. interest from the 20th day of December, 1892: *Faires v. Cockrill*, above cited; *Burns v. Ledbetter*, 56 Tex. 282; *Close v. Fields*, 2 Tex. 232; *Smith v. Johnson*, 23 Cal. 64; *Waldrip v. Black*, 74 Cal. 409, 16 Pac. Rep. 226. The case of *Glasscock v. Hamilton*, 62 Tex. 143, fairly sustains our position on this question. In that case there were five sureties upon the bond of R. N. Lane, collector of internal revenue, upon which bond judgment was entered in the United States circuit court for the sum of \$34,384.03, against the principal, R. N. Lane, Morgan Hamilton, James H. Raymond, James P. McKinney and James M. Swisher. Glasscock, one of the sureties, having died, the case was dismissed as to him, reserving all rights of the United States against his estate. It was provided in the judgment that the sureties against whom judgment was rendered might discharge their liability by the payment of \$10,000.

Hamilton, Raymond and McKinney paid the \$10,000, Swisher being insolvent. This left \$24,384.03, to the payment of which Glasscock's estate alone was liable. Hamilton sued the estate of Glasscock to recover its proportional part of the payment made by him over and above the portion of the \$10,000 which would have been chargeable to him upon a *pro rata* distribution between the solvent sureties. The court held that he was not entitled to recover from the estate of Glasscock, because that estate was alone left responsible to the United States for the balance of the judgment, which was a sum greater than all the sureties had paid thereon. It is fairly deducible from this case that Hamilton, notwithstanding his discharge, would have been entitled to recover against the estate of his deceased co-obligor if the amount paid by him (Hamilton) had been a sum greater than that to which he would have been liable in the discharge of the entire judgment. It is nowhere intimated in the opinion that the discharge of Hamilton in any way affected his right of recovery. In that case the court said: "The equitable right to contribution, which is administered at law as well as in equity, proceeds upon acknowledged principles of equity and justice, and those principles require that where one jointly bound by common obligation to pay the debt of another shall pay more than his ratable share of it the other shall reimburse him therefor; but if such party shall obtain his own discharge, by payment of less than his ratable proportion of the whole debt, and leave his fellow surety liable to pay to the creditor his own original full share of the debt, there is no rule that can be deduced from these maxims of equity and justice on which to raise an assumpsit that such co-surety should contribute to that one who has thus compromised, paid and obtained a discharge. While each surety is, as to the creditor, liable for the whole debt, as between himself and his co-sureties he is liable to contribution, as to those paying the debt, to no more than his equal portion, ratably distributed

between those who are solvent and able to sustain with him the common burden."

There is nothing in the record of this case to show that either of the sureties was insolvent. Therefore, the proportion of the debt left for each of the six to pay after the discharge of Swasey, was less than the amount paid by Swasey on the debt, and each of them, as between him and Swasey, was liable only for that ratable proportion. It is therefore ordered that the judgment of the court of civil appeals be in all things affirmed, except as to the said C. J. Swasey's claim against his co-defendants, and that the judgment of both courts, as between Swasey and his co-defendants, be reversed, and judgment be here entered in favor of C. J. Swasey against E. W. Taylor, A. B. Smith, A. M. Britton, J. J. Roche, administrator of Thomas Roche, deceased, W. F. Lake and R. E. McAnulty for the sum of \$1,117.97, with interest thereon at six per cent. per annum from the 20th day of December, 1892, for which the clerk of the district court of Tarrant county will issue execution against each of said defendants, except J. J. Roche, and that as to said J. J. Roche the judgment be certified to the county court for payment. It is further ordered that the Merchants' National Bank recover of E. W. Taylor and J. J. Roche, administrator, etc., and their sureties, its costs on this writ of error, and that execution issue therefor, and for that portion chargeable to the estate of Thomas Roche, this judgment shall be certified to the county court for payment. It is further ordered that C. J. Swasey have and recover of E. W. Taylor and J. J. Roche, administrator of the estate of Thomas Roche, deceased, and their sureties, his costs upon writ of error to this court, for which execution may issue against the said E. W. Taylor and the said sureties, and that the said judgment, as to the said J. J. Roche, be certified to the county court for payment.

Contribution—Co-sureties—Indorsers of Promissory Note—Evidence.**MONTGOMERY v. PAGE.**

(Supreme Court of Oregon. April 27, 1896.)

(29 Oreg. 320 ; 44 Pac. Rep. 689.)

In an action for contribution, parol evidence is admissible to show an agreement between one who, before delivery of a note and for the accommodation of the maker, guarantied payment thereof by indorsement, waiving protest, demand and notice, and one who signed upon the face as a joint and several maker, but in fact as surety, to become co-sureties as between themselves, and share equally in any loss.

Where evidence is offered in an action for contribution tending to show an agreement between the parties, who signed a note as guarantor and surety respectively, to become co-sureties as between themselves, the special finding of the court that such agreement was made will not be disturbed on appeal, in the absence of a motion by defendant for nonsuit.

A special collateral agreement between parties who sign a note as guarantor and surety respectively, to become co-sureties and share equally in any loss, renders them joint obligors as between themselves, and will support an action for contribution.

Appeal from Circuit Court, Multnomah county ; H. HURLEY, Judge.

Action by James B. Montgomery against C. H. Page to enforce contribution. Judgment for plaintiff, and defendant appeals. Affirmed.

J. W. Whalley, for appellant ; *Raleigh Stott*, for respondent.

WOLVERTON, J.—This is an action to enforce contribution by a co-surety of the defendant. It is the outgrowth of the conditions attending the execution and delivery of a certain promissory note, dated July 14, 1892, calling for \$3,000, payable in sixty days, with interest, to the Security Savings & Trust Company, signed : “ H. M. Montgomery &

Co., Henry M. Montgomery, James B. Montgomery, by W. L. Boise, his attorney in fact; Charles H. Page," and bearing the following indorsement: "For value received, I hereby guaranty the payment of the within note, and waive protest, demand and notice of non-payment thereof. C. H. Page, of Astoria, Oregon." H. M. Montgomery & Co. is a firm composed of Henry M. Montgomery and Charles H. Page; so that the note is signed by the firm and each of its members in their individual capacity. Among other things it is alleged: "That this plaintiff executed said note, as an accommodation-maker, for the benefit of said H. M. Montgomery & Co., and as surety thereto, and received no part of the money obtained upon said note, but that the said H. M. Montgomery & Co. received the entire sum of \$3,000 upon the said note from the said Security Savings & Trust Company; that, before said note was signed by any of the parties thereto, it was agreed by and between the plaintiff and said C. H. Page, of Astoria, Oregon, that both should sign said note as an accommodation to the said H. M. Montgomery & Co., and as co-sureties between themselves, and that if the said H. M. Montgomery & Co. failed or neglected to pay said note, then the plaintiff and defendant each to be liable, as between themselves, for one-half the amount of said note, and if either were obliged to pay said note the other should repay to the one so paying one-half of the amount so paid; that the said C. H. Page, of Astoria, Oregon, guarantied the payment of said note as aforesaid, as an accommodation to the said H. M. Montgomery & Co., and as co-surety with the plaintiff." Issue was taken by the answer with these allegations, and a trial had before the court, resulting in findings and judgment for plaintiff, from which defendant appeals.

Plaintiff offered evidence of a verbal agreement with defendant of the nature set forth in his complaint, which was allowed by the court over the objections of defendant; and this constitutes the principal ground of error relied upon

for reversal. This presents the question whether a person who, for the accommodation of the maker of a promissory note, guaranties the payment thereof by indorsement, waiving protest, demand and notice of non-payment before delivery, can be shown to be a co-surety with one who signed upon the face as a joint and several maker, but in reality as a surety, unless, at the time of assuming the obligation, there existed an agreement in writing between them to become co-sureties, and to share in the loss, if any. In *Wade v. Creighton*, 25 Or. 455, 36 Pac. Rep. 289, it is decided that a third person indorsing a note, waiving protest, demand and notice of non-payment, before delivery, for the purpose of giving the maker credit, must be considered as a first indorser. The indorsement here partakes of the nature of a guaranty, whatever might be held to be its legal effect, whether absolute or conditional, or, as some of the authorities put it, an indorsement of enlarged liability. The contract of a guarantor, as distinguished from that of a surety, is that the principal or obligor will pay. The surety's obligation is to pay the debt. The latter's undertaking is absolute, and is to do the same thing and upon like conditions as the principal, while the former's insures the ability of the principal to perform, and is distinct and independent of the original contract. The contract of an indorser is also an independent undertaking; and if demand, notice and protest are waived, it creates an absolute liability to his immediate indorsee. An indorsement by a stranger, however, is irregular and anomalous, and the engagement thereof has been variously determined by different jurisdictions; and, as between the immediate parties, parol evidence is always admissible to free it of any ambiguity with which it may be attended: *Tied. Com. Paper*, §§ 272, 273. The great weight of authority substantiates the doctrine that parol evidence is admissible to show the true relation subsisting between the makers of a promissory note when contribution is sought, and this whether their subscription

appears to be that of principals or sureties. The reason upon which the rule is founded is that the note itself is the measure of the contract between the makers and the payee, and not between the makers themselves, and that their correlative and independent relation is a matter wholly collateral to the primary undertaking; so that parol evidence establishing such relations does not vary the terms thereof: 1 Brandt, Sur. §§ 29, 31; Williams v. Glenn, 92 N. C. 253; Mansfield v. Edwards, 136 Mass. 15; Power Co. v. Brown, 23 Kan. 676; Barry v. Ransom, 12 N. Y. 462. But can the true relations existing between makers and guarantors or indorsers, who are bound by different, distinct and independent undertakings, be so shown? A leading case which would seem to support the affirmative of this proposition is Phillips v. Preston, 5 How. 278, which was an action by the first indorser against a second to compel contribution by virtue of a special agreement between them that they should each suffer one-half the loss, if any was incurred by reason of default by the maker. It was objected that the alleged special agreement was a verbal one, and could not be proven as in contravention of a written one between the parties or of the statute of frauds and perjuries. The court say, at page 291: "But the parol evidence here is not offered in any action on the note, or to alter its terms or its indorsements; nor is any prior or contemporaneous conversation offered to vary the note or its indorsement in an action founded on either of them. But it is offered to prove a separate contract, which was made by parol, and is of as high a character as the law requires in such cases." And it was accordingly held that parol testimony was competent to show the agreement. Weston v. Chamberlin, 7 Cush. (Mass.) 404, was a similar action between first and second indorsers, where it was said by METCALF, J.: "The authorities are decisive that the plaintiff ought to have been permitted to prove that, as between him and the defendant, they were, by virtue of a collateral

agreement, co-sureties. . . . Proof of such oral collateral agreement does not contradict nor vary the written agreement. The two are distinct." See, also, *Clapp v. Rice*, 13 Gray, (Mass.) 403. There it was held that the relations between the parties could be shown by parol to be that of co-sureties, even if the plaintiffs had been promisors and the defendant's intestate an indorser. And in *Ross v. Espy*, 66 Pa. 481, it was held that "the contract of indorsement is one implied by the law from the blank indorsement, and can be qualified by express proof of a direct agreement between the parties, and is not subject to the rule that excludes the proof to alter or vary the terms of an express agreement." To the same effect see *Dunn v. Wade*, 23 Mo. 207, and *McCune v. Belt*, 45 Mo. 174. This latter case was an action by the drawer against an indorser. See, also, *Sturtevant v. Randall*, 53 Me. 149; *Smith v. Morrill*, 54 Me. 48; *Coolidge v. Wiggin*, 62 Me. 568; *Denton v. Lytle*, 4 Bush, (Ky.) 597 (a case of drawer against indorser); *Edelen v. White*, 6 Bush, (Ky.) 408 (also a case of drawer against indorser); *Nurre v. Chittenden*, 56 Ind. 462, 465 (a case of surety against indorser); *Harshman v. Armstrong*, 43 Ind. 126 (also of surety against indorser); and *Easterly v. Barber*, 66 N. Y. 433. The case of *Johnson v. Ramsey*, 43 N. J. Law, 279, is an authority against this doctrine; but it seems to stand alone so far as we have been able to discover, and no authorities are cited to support the view therein taken. However, the reasoning of Chief Justice BEASLEY is cogent and strong, and is entitled to much weight. The learned chief justice argues that by the act of indorsement the indorser enters into a substantive independent contract with the indorsee, and, although in blank, commercial law has fixed with absolute certainty the terms of the indorser's engagement. They are (1) that the bill or note will be accepted or paid; (2) that it is genuine; (3) that it is a valid instrument; (4) that the ostensible parties are competent, and (5) that he has lawful title and

right to indorse. Such being the case, the undertaking is as much a written contract as though all the terms had been expressly stipulated, and the rule that a written contract cannot be varied by proof of an oral agreement to the contrary is equally applicable thereto.

It may be conceded that such is the law in all cases where it is sought to enforce the obligation thus assumed—that is to say, if the action is upon the bill or note or the contract of indorsement, such bill, note or contract, express or implied, is the measure of the recovery, and proof of an oral agreement cannot be invoked to add to, take from, or in any manner vary or change its established legal import. But this does not involve a contract between successive accommodation indorsers, or between an accommodation maker and such an indorser, to stand as co-sureties, and to share in the loss, if any should be incurred by the transaction. Such a contract is collateral to that arising from the execution of the note or the indorsement thereof. As it pertains to successive indorsers, the law fixes their liability in the inverse order of their indorsement. This is the result flowing from regular indorsements. If, however, the indorsements are irregular—that is to say, if they have been made by third parties, not to effect a transfer of the paper, but to create a liability for the accommodation of some one or more of the parties thereto—the law attaches to the transaction a presumption only, not an absolute result. This presumption is differently declared in different jurisdictions. This court, in harmony with the New York doctrine, has declared such an indorser to be *prima facie* a second indorser, and is visited with the engagements that attach to such an obligation: *Deering v. Creighton*, 19 Or. 118, 24 Pac. Rep. 198. But even in an action by the payee this presumption may be rebutted, and he may be shown to be a first indorser, with the attendant obligations. See *Wade v. Creighton*, 25 Or. 455, 36 Pac. Rep. 289. So it has been held, as touching irregular indorsements, that as be-

tween the maker or drawer and indorser, or a surety and indorser, or as between successive indorsers, the presumption which the face of the transaction imports may, as between accommodation parties to the paper, be rebutted, and their true relation shown to be that of co-sureties. Thus it was held in *McNeilly v. Patchin*, 23 Mo. 43: "When two or more persons are sureties for another, the law implies a promise from each to contribute equally towards any loss which may be occasioned thereby. If they become sureties by successive indorsements on mercantile paper, as that is a form of contract, which, in general, binds the first to indemnify the second, the law presumes that they mean to stand as they have placed themselves. But if there was an agreement between them to become indorsers for the accommodation of the drawer, the latter presumption is removed, and the original one restored." So it is said in *Sweet v. McAllister*, 4 Allen, (Mass.) 354: "Nothing can be plainer than that in the absence of any proof to the contrary, the parties to a promissory note are liable on it according to the legal effect of the instrument—that is to say, the maker is liable to the payee and indorsees, the payee to the indorsees, and each indorser to the subsequent indorsees. It may be proved by parol that the relation of the parties to each other is different from this; for example, that the payee or indorsee was the real principal, or that all the parties were joint principals, or some of them joint sureties"—citing *Clapp v. Rice*, *supra*. There must have been, however, at the time of entering into such relations a contract or agreement between the accommodating parties, either express or implied, to become co-sureties, and to share in the loss which might result from the obligations assumed, as without it the law fixes their engagements, and the mere fact that they have become parties for accommodation cannot change the result: *McDonald v. Magruder*, 3 Pet. 470; *McCarty v. Roots*, 21 How. 432; *McCune v. Belt*, 45 Mo. 174; *Stillwell v. How*, 46 Mo. 589; *Kirschner v. Conklin*,

40 Conn. 77; Hogue v. Davis, 8 Gratt. (Va.) 4. So it is that testimony of such a verbal agreement is allowed to rebut a presumption and to prove a collateral fact, and the reasoning which supports an action upon a verbal collateral agreement between co-sureties, who become joint or joint and several makers for the accommodation of the principal, also supports the action between successive accommodation indorsers or between the drawer or a surety and the indorser.

Coming now to the case in hand, the defendant's obligation is apparently that of a guarantor; but there is no reason why the true relation existing between him and a surety may not be shown as well as if he was an indorser. Both are substantive, independent contracts, as they relate to the note itself. Primarily they constitute contracts with the payee, and presumptively between the accommodation parties, but in reality are subservient to any special contract entered into between the accommodating parties to be bound, *inter sese*, as co-sureties. But it is argued that defendant, as guarantor, is not jointly bound with plaintiff, as surety or joint and several maker, for the payment of the note, and hence they cannot be treated as co-sureties, as the obligations of co-sureties must be joint, and not separate and successive. If, however, the special collateral agreement alleged to have been entered into between plaintiff and defendant is to stand, as between themselves as co-sureties, and is valid (and we have seen that it is), they are joint obligors as it concerns the collateral undertaking, while they may not be as it pertains to the payee, and this is sufficient to support the action.

A second contention is that there is no evidence showing any agreement between plaintiff and defendant such as set out in the complaint; but there was evidence offered which, to say the least, tended in some measure to establish the agreement, and the court below having specially found that such an agreement did exist, in the absence of a motion for

nonsuit against plaintiff, we cannot look into the evidence or disturb the finding. The judgment of the court below will be affirmed.

Contribution—Joint Tort-feasors—Liability of Husband for Tort of Wife—Action for Indemnity.

CULMER v. WILSON ET UX.

(Supreme Court of Utah. March 26, 1896.)

(44 Pac. Rep. 833.)

When a trustee enters suit at the request and for the benefit of the *cestui que trust*, and wrongfully and knowingly obtains a judgment in a court having no jurisdiction in the case, and the circumstances are such as to show that he knew the illegal nature of the act, or were sufficient to render ignorance of the illegality inexcusable, and he becomes thereby a joint trespasser to a void judgment, and where such trustee or agent is sued jointly with the principal for damages arising from the illegal proceedings, trespass and judgment, and he pays the judgment rendered against both, then he will be left by the law where his wrongful act places him. In such case the rule that precludes one tort-feasor from indemnity against the other applies, and he is not entitled to contribution from the other tort-feasor.

But when a naked trustee or agent enters suit at the request and for the benefit of the *cestui que trust*, and is innocent of any illegal purpose, ignorant of the nature of the act, which was apparently honest and proper, and acted in good faith, with an honest purpose, in what appeared and he believed to be right, and, from the nature of the case, he could not be presumed to know that he was doing an illegal act, and the tort is one arising from a construction or inference of law, and not arising from a known meditated wrong, and he pays the judgment rendered against both, then the rule changes with the reason, and such innocent agent may have contribution from the joint tort-feasor.

When a party sued as a joint tort-feasor makes a *bona fide* claim to the property, and seeks to obtain possession by legal process, from a court that he believes has jurisdiction, he may direct his agent to do those acts necessary to be done in asserting those *bona fide* rights; and if it is decided that such claim is invalid, or that the court has no jurisdiction, in the eyes of the law, growing out of the mere relation of the perpetrators of the injury, the maxim of the law that there is no contribution among

wrongdoers does not apply, and the law will imply an indemnity to such agent who believed as his principal did, and who acted in good faith, and was innocent of any wrongful intent or purpose, for any damages he was made to pay on account of such act done in pursuance of his principal's directions, within the scope of his instructions and employment.

Our statutes have relieved married women from common-law disability, and given them independent power to deal with, manage, control, transfer, dispose of, hold and enjoy all their separate property, without limitation or restriction by reason of marriage, to make contracts, contract property, to sue and be sued, defend and be defended, and in all respects places her in the same position with reference to contracts, property and liability, and on the same footing, with other persons ; and, when a failure to perform a duty under a contract is itself a tort, it may be treated as such against a married woman, thus taking away a reason of the common-law rule. And, while the statutes do not in express words repeal the common-law rule that the husband is liable for the torts of the wife, it has made such modifications in the husband's rights and her disabilities as to wholly remove the reason for his liability ; so that she can control her time, earnings and property, and must be held liable for her torts.

The husband is not liable for the torts of his wife committed before marriage, and while she was the wife of another man.

In an action for indemnity against actual damages, the party indemnified has no cause of action until he is damaged ; and the statute of limitations does not commence to run until the judgment rendered against him for damages is paid.

Appeal from District Court, Salt Lake county ; S. A. MERRITT, Judge.

Action by William H. Culmer against R. G. Wilson and Belle Wilson, his wife. From a judgment for defendants, plaintiff appeals. Affirmed as to R. G. Wilson, and reversed as to Belle Wilson.

Sutherland & Murphy, for appellant.

C. S. Varian, for respondents.

MINER, J.—The complaint in this case shows that the plaintiff held title to certain real estate in Juab county, merely as trustee for the use and benefit of the defendant Belle Wilson, who was then the wife of Harvey K. Tompkins ; that plaintiff had no beneficial interest therein, and

that in September, 1887, he conveyed the property to said Belle Wilson; that plaintiff simply held the title for her in trust on account of the intemperate habits of her then husband; that prior to said conveyance to her, in 1887, the said Belle Wilson informed the plaintiff that one Anna Marks was wrongfully entering upon said property, by attempting to take possession of a portion of the same, and erect a house thereon, and that said acts were an interference with her rights in said property, and requested plaintiff to consult an attorney, and cause such proceedings to be taken as would prevent said Anna Marks from maintaining her tortious possession of said property; that plaintiff gave full credit to such statements and instructions, and, in pursuance of said Belle Wilson's request, he, fully believing in the merits of her claim, consulted an attorney, and followed the instructions and advice of said attorney, and filed a complaint prepared by said attorney, with a commissioner appointed by the Supreme Court, and having jurisdiction of a justice of the peace, residing and holding his office at Provo City, Utah county, to commence an action in the name of Belle Tompkins (now Belle Wilson) against said Anna Marks, for forcible entry and detainer of the premises; that at such time the jurisdiction of a Supreme Court commissioner was not defined by law; that said plaintiff fully believed that said commissioner had jurisdiction to try said action; that, acting in concert with said attorney, and under his directions, and under the direction of the said Belle Wilson, he assisted in the prosecution of said suit to judgment for a restitution of the premises, and a writ of restitution was issued by said commissioner, and placed in the hands of a constable at Eureka, Juab county, for execution; that all the acts of said plaintiff were simply to advance the interests of said defendant Belle Wilson, fully believing she had suffered wrongs from said Anna Marks, and that said proceedings were proper and lawful to protect her rights; that said writ was executed at the request of

said Belle Wilson in December, 1887, but the plaintiff was not present at the execution of the same; that, under said writ, Anna Marks was ejected, and Belle Wilson restored to possession; that on February 27, 1888, said Anna Marks and Wolf Marks, her husband, brought an action in the district court against Belle Wilson, this plaintiff, and others, claiming damages for a trespass in being unlawfully ejected under said writ, and on April 30, 1892, judgment was duly rendered in said action, against said Belle Wilson, this plaintiff, and others, for the sum of \$3,500 damages, and \$205.90 costs of suit, which judgment was afterwards affirmed by the Supreme Court; that on said trial it was held that said commissioner had no jurisdiction to try the case; that on October 1, 1891, said Belle Wilson, formerly Belle Tompkins, intermarried with said defendant R. G. Wilson, and, in December following, she conveyed to said R. G. Wilson said real estate and all other property belonging to her; that on July 1, 1893, execution was issued on said judgment, of which plaintiff had notice, and plaintiff paid said judgment and costs, amounting to \$4,052.65, and took an assignment of said judgment; that plaintiff's participation with Belle Wilson in said action in said alleged trespass complained of was as her agent and servant, and in her interest and for her benefit; that all his acts were done in the firm belief that said Belle Wilson had the right which she asserted, and that the acts done by plaintiff were legal acts, to enable said Belle Wilson to enjoy her own property, and therefore claims that defendants are bound to indemnify said plaintiff against all legal consequences of said action, and, among others, against the said judgment, and therefore are now legally bound to refund him the amount paid to satisfy the said judgment, etc. To this complaint, the defendant R. G. Wilson demurred, on the ground that the complaint did not state facts sufficient to constitute a cause of action. The defendant Belle Wilson demurred on the grounds that the same is ambiguous, unin-

telligible and uncertain in this: No agreement or understanding for indemnity is alleged. It is not alleged that plaintiff paid the judgment by request of defendant or of necessity. It does not appear that plaintiff committed a tort, jointly with this defendant and others, for which judgment was recovered against plaintiff *et al.*, which judgment he was bound to pay. It does not appear but plaintiff participated with the other persons mentioned as tort-feasors, and was liable for his acts, independently of his acts for this defendant. It appears upon the face of the amended complaint that the alleged cause of action is barred under § 196 of the Code of Civil Procedure. The demurrers were severally sustained, and the complaint was dismissed. Plaintiff elected not to amend. From this order and judgment, this appeal is taken. The appellant relies for reversal of the judgment on the point that the complaint states facts sufficient to constitute a cause of action, and that the same was not subject to either of the objections stated in the several demurrers filed. The facts stated in the complaint are admitted by the demurrer. The questions presented by this appeal are admitted to be: First. Does the plaintiff state a case for indemnity within the recognized exceptions to the rule refusing indemnity between joint tort-feasors? (No question as to the right of partial contribution is made.) Second. Is the husband, under our law, liable for the torts of a woman committed before marriage, and while she was the wife of another man?

The question presented by the first proposition must be treated in the light of the admitted facts, which are that the plaintiff had no personal interest whatever in the proceeding which was instituted to recover possession of the property against Anna Marks, except as agent for Belle Wilson. He was informed by Belle Wilson, and believed in good faith, that Anna Marks was intruding and trespassing upon the property in question, and erecting a building thereon, in violation of her right. He was requested

by Belle Wilson to consult an attorney, and cause such proceedings to be taken as would prevent Anna Marks from maintaining her tortious possession of the property. He gave full credit to Belle Wilson's statements as to the wrong being done her; and in pursuance of, and in obedience to, her request, and in reliance upon the merits of her claim, he consulted an attorney, and followed that attorney's directions and advice, and commenced a suit before a Supreme Court commissioner, whose jurisdiction at the time was not defined by law; but he fully believed that said commissioner had jurisdiction to try the case, and judgment was recovered, and execution issued and enforced, in his absence, at Belle Wilson's request. Plaintiff simply sought to advance the interests of Belle Wilson, believing in good faith that she had suffered wrong, and that the said proceedings were proper and lawful to protect her rights. His actions and doings in the premises were as her agent and servant, in her interest and for her benefit, believing she had the rights which she asserted, and that the acts done were legal acts, to enable her to enjoy her own property. In the light of these admitted facts, should Belle Wilson's demurrer be sustained?

"It is a general rule that no man can make his own misconduct the ground for an action in his own favor. If he suffers because of his own wrong, the law will not relieve him. But to this rule there are many exceptions, which rest upon reasons at least as forcible as those which support the rule itself. They are of cases where, although the law holds all the parties liable as wrongdoers to the injured party, yet, as between themselves, some of them may not be wrongdoers at all, and their equity to require the others to respond for all the damages may be complete. There are many cases where the wrongs are unintentional, or where the party, by reason of some relation, is made chargeable with the conduct of others:" Cooley, Torts, p. 144; *Butterfield v. Cold-Storage Co.*, 11 Utah, 194, 39 Pac. Rep. 824. Where the act is not known to be unlawful, and where the

parties employing the officer are acting in good faith, in the assertion of what they believe to be their right under the law, an agreement to indemnify the officer will be valid, even though it should subsequently appear that they were not justified in doing the acts against the consequences of which the indemnity was given: Mechem, Pub. Off. § 889. Judge COOLEY, in his work on Torts (page 145), says: "There are some exceptions to the general rule, which rest upon reasons as forcible as those which support the rule itself. They are of cases where, although the law holds all the parties liable as wrongdoers to the injured party, yet, as between themselves, some of them may not be wrongdoers at all, and their equity to require the others to respond for all the damages may be complete." In *Bailey v. Bussing*, 28 Conn. 455, the court said, of the maxim that there is no contribution among wrongdoers, that "it is too much broken in upon at this day to be called with propriety a 'rule of law,' so many are the exceptions to it, as in the case of master and servant, principal and agent, partners, joint operators, carriers, and the like." "This rule," said Judge STORY, "is to be understood according to its true sense and meaning, which is where the tort is a known, meditated wrong, and not when the party is acting under the supposition of the innocence and propriety of the act, and the tort is one of construction and inference of law:" Story, Partn. § 220. In *Nelson v. Cook*, 17 Ill. 449, the court says: "Where one is employed or directed to do or commit a known crime, misdemeanor, trespass or wrong, and the employe or agent knows it to be such, an express promise of indemnity is void, being against the peace and policy of the law; yet where the question of title to the property is one of doubt, controversy or uncertainty, and the act to be done is not an apparent wrong, and the person or agent employed or directed to do the act does not know that it is a wrong or trespass, in such case he may sue and recover indemnity from his employer upon an implied as-

sumption, to save himself harmless for the act." Judge COOLEY, in his excellent work on Torts (page 146), says: "If the question of law or fact is in doubt, it is not incompetent for the party suing out process to take upon himself the responsibility, and when he does so, and agrees to indemnify the officer, the agreement may be enforced. This, he says, is upon the same ground that though, as to the party injured, both may be technically in the wrong, it is not so as between the parties themselves." Again, in § 148, this learned writer says: "If he knew the act was illegal, or if the circumstances were such as to render ignorance of the illegality inexcusable, then he will be left by the law where his wrongful action has placed him." The reason given in many books for denying contribution among trespassers is that no right of action can be based upon a violation of the law. When the act is known to be such, or is apparently of that nature, a guilty trespasser places himself without the pale of the law, and a guilty trespasser cannot be allowed to appeal to the law for indemnity. If, however, he be innocent of any illegal purpose, ignorant of the nature of the act, which was apparently honest and proper, and he apparently acted in good faith, with an honest purpose, in what appeared to be right, and, from the nature of the case, could not be presumed to know that he was doing an illegal act, and the tort is one arising from construction or inference of law, and not arising from a known meditated wrong, the rule above stated will be changed with the reason, and he may then have contribution. Where a party makes a *bona fide* claim to property, as in this case, and seeks to obtain possession by legal process from a court that he believes has jurisdiction, he may direct his agent to do those acts necessary to be done in asserting those *bona fide* rights; and if it is decided that such claim is invalid, or that the court has no jurisdiction in the eye of the law growing out of the mere relation of the perpetration of the wrong, the maxim of the law that there is no contribution

among wrongdoers is not applied, and the law will imply an indemnity to such agent who believes as his principal does, for any damages he was made to pay on account of such acts done in pursuance of his principal's directions, within the scope of his instructions and employment: Cooley, Torts, pp. 145-149; Bailey v. Bussing, 28 Conn. 455; Story, Partn. § 220; Nelson v. Cook, 17 Ill. 443; Betts v. Gibbins, 2 Adol. & E. 57; Gower v. Emery, 18 Me. 79; Mechem, Pub. Off. § 890; Coventry v. Barton, 17 Johns. (N. Y.) 142; Acheson v. Miller, 2 Ohio St. 203; Merrill v. City of St. Louis, 12 Mo. App. 466.

The effect of Belle Wilson's instructions was to employ an attorney, commence the suit, and to follow his advice. The proceedings were those advised and conducted by the attorney employed, and the plaintiff believed the proceedings were regular, and that the commissioner had jurisdiction. Under the facts, the plaintiff was not guilty of an intentional tort, nor of committing a known and meditated wrong. In the case of Marks v. Culmer, 6 Utah, 419, 24 Pac. Rep. 528, the court said: "In People v. Hills, (Utah) 16 Pac. Rep. 405, this court said: 'We entertain no doubt that the commissioner is acting in good faith, as there has been diversity of opinion in the profession and among commissioners as to the construction of the statute under consideration.' This applies equally to the parties and attorneys. This was the first authoritative decision of the question."

The respondent contends that the judgment obtained by Anna Marks is conclusive of the liability of each of the defendants, and that they committed the wrong intending to commit it, or did it under circumstances fairly charging them with intending the consequences that followed. In that we cannot agree. The judgment in Marks v. Culmer is only conclusive that all the defendants therein, including the plaintiff, were liable to the injured party. Any other holding would preclude contribution or indemnity in cases

of this character. There would be no value to an exception to the general rule that there is no contribution or indemnity between wrongdoers, if the judgment against wrongdoers in favor of the injured party was conclusive that the wrong was intended, and therefore must be a known and meditated tort. Nearly all the cases where indemnity has been allowed were cases in which a judgment had been rendered and paid. We think the admitted facts bring the plaintiff within the exception to the general rule.

For the reasons given, we think the court erred in sustaining the demurrer of Belle Wilson.

The next question is as to whether the husband, under our law, is liable for the torts of a woman committed before marriage, and while she is the wife of another man. When the action for damages was commenced by Anna Marks against Belle Wilson, this plaintiff, and others, for the damages recovered, Belle Wilson was the wife of Harvey K. Tompkins, but was divorced from him in 1889, before judgment was rendered in that case; and it does not appear from the complaint whether or not he was made a party defendant with his wife in that action, wherein judgment was rendered April 30, 1892, although, if we consult the decision in that case, we find that Harvey K. Tompkins was a defendant, and charged as an active party therein. Belle Wilson intermarried with defendant, R. G. Wilson, October 1, 1891, and soon thereafter conveyed to him the property in question, but R. G. Wilson was not made a defendant in that suit; but plaintiff seeks to charge said defendant R. G. Wilson with the payment of a judgment rendered against his wife for a tort committed by her with others, not only before marriage, but while she was the wife of another man, named Harvey K. Tompkins, and claims that while Tompkins, the former husband, was liable for such while his marital relation existed, on the divorce being granted dissolving that marriage, Tompkins was discharged from that liability, and from that time it became and was

the liability of the wife until her marriage with defendant Wilson, and that on that event his liability attached, and that this rule is not changed by statute in this state. It is true that at common law the husband was answerable for the wife's debts before marriage, but, if they were not recovered during coverture, he was discharged. As his liability originated in the marriage, so it ceased with it. The reason assigned for this liability is that the husband is entitled to the rents, profits and issues of the wife's real estate during coverture, and to the absolute dominion and control over her personal property in possession. The wife, by entering into the marriage relation, was, at common law, entirely deprived of the use and disposal of her property, and could acquire none by her industry. Her time and personal labor belonged to her husband. Under the common law, he could inflict punishment on her, for he was answerable for her misconduct, and the law left him with this power of restraint and correction, the same as he could correct his children or his apprentices. At common law, the husband had almost absolute control over the person of the wife, as well as her property, and he became the arbiter of her fortune. She was in a condition of complete dependence. She could not contract in her own name, was bound to obey him, and her legal existence was merged into that of her husband; so that they were termed and considered one in law. As a consequence, he was made liable for her debts contracted before marriage, and for her torts and frauds committed during coverture. If they were done in his presence or by his procurement, he alone was liable; otherwise, both must be jointly guilty: *Bryan v. Doolittle*, 38 Ga. 255; 2 Kent, Comm. 143-149; *Schouler*, Dom. Rel. 56, 75; *Handy v. Foley*, 121 Mass. 259.

But our statutes have changed this relation and liability. Section 2528, Comp. Laws 1888, reads as follows: "All property owned by either spouse before marriage, and that acquired afterwards by purchase, gift, bequest, devise or

descent, with the rents, issues and profits thereof, is the separate property of that spouse by whom the same is so owned or acquired ; and separate property owned or acquired as specified above, may be held, managed, controlled, transferred and in any manner disposed of by the spouse so owning or acquiring it, without any limitation or restriction by reason of marriage." Section 2529 reads as follows : " Either spouse may sue or be sued, plead or be impleaded, or defend and be defended at law." Section 3428 provides that all compensation due the wife for her personal services is exempt from execution against her husband. Section 3172 provides that " when a married woman is a party her husband must be joined with her ; except, when the action concerns her separate property, or her right or claim to the homestead property, she may sue or be sued alone. When the action is between herself and her husband, she may sue or be sued alone. When she is living separate and apart from her husband, by reason of his desertion of her, or by agreement in writing entered into between them, she may sue or be sued alone." These statutes have relieved married women from common-law disabilities, and given them independent power to deal with, hold, and enjoy all their property, to make contracts, contract property, to sue and be sued, defend and be defended, and in all respects places her in the same position with reference to contracts, property and liability, on the same footing with other persons ; and, when a failure to perform a duty under a contract is in itself a tort, it may be treated as such against a married woman. The same would be true of any breach of duty imposed upon a married woman as owner of property which she owns and controls, the same as if unmarried. The common-law rule, it will be remembered, which made the husband liable for the wife's torts, proceeded upon the ground that as the husband succeeded, *jure mariti*, to the entire estate of the wife, real and personal, and to the right of her earnings, so that she could not respond in damages for any wrong which she

might commit, it was but right that he should respond for her, so long as the coverture continued. Such being the reason of the rule, if a statute intervenes giving the wife, during coverture, the sole control of all property owned by her before marriage, and that acquired afterwards by purchase, gift, bequest, with the rents, issues and profits thereof, and the same is the separate property of the wife, and the same may be held, managed, controlled and transferred, and in any manner disposed of, by her, without any limitation or restriction by reason of marriage, with the right to use and possess the same, thus taking away entirely the reason of the common-law rule, it would seem, on principle, that the rule itself ought to cease, though the statute makes no mention of the husband's liability for the wife's torts, or her right to her own personal services.

Judge COOLEY, in his work on Torts, (§ 118), says, "In Illinois it has been decided that, under the same statutes, the husband is not liable for a slander of the wife in which he did not participate, though the statutes on the subject which were supposed to have changed the common law were silent as regards the torts, and only purported to secure to the woman her property, earnings, and the full control and enjoyment thereof. This is perhaps a sound conclusion. Certainly, the reasons on which the new legislation proceeds are such as to leave the wife to respond alone for her torts, for they assume that she is fully capable of controlling her own actions, and can and will act independent of her husband." A similar rule is laid down in Kansas: *Norris v. Corkill*, 32 Kan. 409, 4 Pac. Rep. 862. So in Michigan, unless her acts are in some way connected with her husband's authority, or owing to his fault: *Ricci v. Mueller*, 41 Mich. 214, 2 N. W. Rep. 23. In Pennsylvania the husband is not liable, under the act of 1887, for the wife's individual tort: *Kuklence v. Vocht*, (Pa. Sup.) 13 Atl. Rep. 198. In Illinois, Michigan and Iowa the statutes in relation to the rights of married women have been held to

entitle the wife to recover, for her own use, a damage suffered for a personal tort. In *Martin v. Robson*, 65 Ill. 132, the court said: "The intention of the legislature to abrogate the common-law rule to a great degree; that husband and wife were one person, and to give to the latter the right to control her own time, to manage her separate property, and contract with reference to it, is plainly indicated by these statutes. While they do not expressly repeal the common-law rule that the husband is liable for the torts of the wife, they have made such modifications of his rights and her disabilities as wholly to remove the reason for the liability." A liability which has for its consideration rights conferred should no longer exist when the consideration has failed. If the relations of husband and wife have been so changed as to deprive him of all right to her property, and to the control of her person and her time, every principle of right would be violated to hold him still responsible for her conduct. If she is emancipated, she should be no longer enslaved.

If we could look into the record and decision of this court, we should find that Harvey K. Tompkins was made a joint tort-feasor, defendant with his wife Belle Tompkins, and that a judgment was rendered against him, together with the other defendants, for the tort complained of. This judgment is still standing against him, as an active participant in the tort, notwithstanding the divorce afterwards obtained by his wife; and if he is released from that part of the judgment which attaches to him solely as the husband of Belle, and which is transferred to R. G. Wilson, as his successor to his marital rights with her, then we have two husbands, one succeeding the other, held liable for the torts of the wife. The first husband is held because he jointly committed the tort. The second falls heir to that part of the marital damages thrown off and left him by his wife's divorce before satisfaction rendered. We are aware of some confusion in the authorities as to the right of the husband

to his wife's personal services, unless the statute expressly confers the right; but when the statute gives her full control and management of all her property acquired, before and after marriage, with the rents, issues and profits thereof, together with the right to transfer, manage and dispose of the same, without any limitation or restriction by reason of marriage, and the right to sue and be sued, to defend and be defended, the same as any other individual, and exempts compensation due her for her person's services from an execution against her husband, then these rights necessarily carry with them the right to such of her time, services and earnings as would be necessary to properly attend to, control and manage property rights and personal interests thus taken from the control of her husband, and conferred upon her by law. What beneficial interest would she acquire by the statute if she is prohibited from using her time in controlling and managing these interests conferred by it? Plainly, but little. It can hardly be contended that the legislature, in enacting these statutes, intended to bestow a right upon her with one hand, and to withdraw that right from her as with the other.

Under the law and the facts in this case, we hold that the defendant, R. G. Wilson, is not liable for the torts of his wife, committed before he married her and while she was the wife of another man. We are of the opinion that the demurrer of defendant, R. G. Wilson, was rightfully sustained: Comp. Laws 1888, §§ 2528, 2529, 3172; *Norris v. Corkill*, 32 Kan. 409, 4 Pac. Rep. 862; *Merrill v. City of St. Louis*, 12 Mo. App. 466; 2 Bac. Abr. p. 61; *Martin v. Robson*, 65 Ill. 129; *Cooley*, Torts, 118; 2 Bish. Mar. Wom. § 24, and note; *Marks v. Culmer*, 6 Utah, 419, 24 Pac. Rep. 528; *Warr v. Honeck*, (Utah) 29 Pac. Rep. 1117; *Ricci v. Mueller*, 41 Mich. 214, 2 N. W. Rep. 23.

In Belle Wilson's demurrer is stated, as the last ground of demurrer, "that the action is barred by subdivision 1 of § 196 of the Code of Civil Procedure" (general section 3145),

which limits the right of action to two years. The judgment was rendered April 30, 1892. Plaintiff paid it July 1, 1893, and brought this action June 15, 1894. This was an action for indemnity against actual damages, and the party indemnified had no cause of action until he was damaged, and the statute of limitations commences to run from the time the judgment was paid: *Oaks v. Scheifferly*, 74 Cal. 478, 16 Pac. Rep. 252; *Wicker v. Hoppock*, 6 Wall. 94.

The order and judgment of the trial court sustaining the demurrer of R. G. Wilson is affirmed, and the order and judgment sustaining the demurrer of defendant, Belle Wilson is set aside and vacated, with instructions to the court below to enter such order accordingly. Plaintiff is entitled to recover costs against Belle Wilson, and R. G. Wilson is entitled to recover costs against the plaintiff.

ZANE, C. J., and BARTCH, J., concur.

Trustee—Breach of Trust—Trustee Beneficiary—Liability for Loss to Trust Estate—Contribution between Co-trustees—Advance of Trust Money—Repayment of Private Debt of Trustee out of Advance—Following Trust Funds.

CHILLINGWORTH v. CHAMBERS.

(Supreme Court of Judicature—Court of Appeal. February 20, 1896.)

([1896] 1 Ch. 685.)

The rule as to the right of a trustee to contribution from his co-trustee for loss occasioned to the trust estate by a breach of trust for which both are equally to blame, does not apply where one of the trustees is also a *cestui que trust* and has received, as between himself and his co-trustee, an exclusive benefit by the breach of trust; in that case the rule to be applied is that under which the share or interest of a *cestui que trust* who has assented to and profited by a breach of trust has to bear the whole

loss; and the trustee who is the *cestui que trust* must therefore indemnify his co-trustee to the extent of his share or interest in the trust estate, and not merely to the extent of the benefit he has received.

The plaintiff and defendant, the trustees of a will, invested certain trust funds, part of the trust estate, in securities of a description authorized by the will. The plaintiff, while a trustee, became also entitled as a beneficiary to a share of the trust estate. The investments, some of which were made before and others after the plaintiff became a beneficiary, turned out insufficient, and the plaintiff and defendant were declared jointly and severally liable to make good the loss to the trust estate. The whole of the loss was made good out of the plaintiff's share of the trust estate, which share exceeded the amount of the loss.

Held, by the court of appeal, LINDLEY, KAY and A. L. SMITH, L. JJ., affirming NORTH, J., that the plaintiff had no right of contribution from the defendant in respect of any part of the loss.

The extent of the liability of a trustee beneficiary for a breach of trust in which he is implicated, discussed.

The fact that a borrower of trust money from trustees repays out of the money so borrowed a debt due from him to one of the trustees, is not, of itself, sufficient to render the trustee so accepting repayment liable for breach of trust, the borrower of the trust money being under no restriction as to its application.

Under the will of John Wilson, who died on November 2, 1875, the plaintiff Chillingworth and the defendant Chambers held certain trust funds upon trust to secure an annuity to the testator's widow, and, subject thereto, upon trust for his five children equally, the share of each daughter being for her separate use. The will contained a power to invest on mortgage of leasehold property. One of the testator's daughters was the wife of the plaintiff Chillingworth. She died in May, 1881, intestate, and thereupon her husband became her administrator, and entitled beneficially to her one-fifth share of the trust funds.

In and after 1878 the plaintiff Chillingworth and the defendant Chambers, as the trustees of the will, advanced out of the trust funds to one James Hughes, a builder, who was being employed by the trustees to erect houses on the testator's property, various sums amounting altogether to £8,650, on the security of eight mortgages of certain leasehold prop-

erties belonging to Hughes and forming part of a building estate. Four of these mortgages were made in the lifetime of Mrs. Chillingworth, namely, in December, 1878, March, 1879, August, 1879, and April, 1880; and the other four were made after her death, as to two in November, 1881, and as to the other two in March, 1883. The plaintiff Chillingworth took an active part in negotiating these several mortgages, he arranging with Chambers and Hughes the amount of each loan and the rate of interest—which was, in each case, five per cent.—his object being to obtain first for his wife and afterwards for himself as high a rate of interest as possible.

In 1883, shortly after the last of the above investments, this action was commenced by Chillingworth, who, besides being a trustee of the will, had then, as above stated, become beneficially entitled to his deceased wife's one-fifth of the trust funds, and by a married daughter of the testator entitled to another fifth, against Chambers, the other trustee, for the removal of Chambers from his office of trustee, and for administration of the testator's estate. The action failed so far as it sought for the removal of the defendant Chambers, from his office of trustee; but an order was made directing ordinary administration accounts and inquiries. The mortgages were realized in the action, and produced in all £7,070, leaving a deficiency of £1,580, and thereupon an order was made declaring that the plaintiff, Chillingworth, and the defendant, Chambers, were jointly and severally liable to make good that deficiency as a breach of trust, and for payment accordingly. As the result of that order the whole of the deficiency of £1,580 was made good out of the share of the testator's estate in court to which Chillingworth was beneficially entitled, and which share exceeded the amount of the deficiency.

An inquiry was then directed how and in what proportions, as between the plaintiff, Chillingworth, and the defendant, the loss of £1,580 was ultimately to be borne and

paid. The chief clerk found by certificate, dated April 23, 1895, that the whole of the loss ought to be borne and paid by the plaintiff, Chillingworth. This was a summons by the plaintiff, Chillingworth, to vary the certificate: (1) by directing that the loss of £1,580 should be ultimately borne and paid by the two trustees in equal shares; (2) in the alternative that the plaintiff, Chillingworth, should be solely directed only to bear so much of the loss as accrued on the mortgages that were made after he became a beneficiary, and that the rest of the loss should be borne by the trustees equally.

It was contended before the chief clerk that, admitting the plaintiff, Chillingworth, to have derived a benefit from the investments through the higher rate of interest obtained, yet the defendant, Chambers, had himself derived a much larger advantage, inasmuch as it appeared from the evidence that Chambers had been engaged or interested with Hughes in the latter's building speculations, and had made temporary advances to Hughes from time to time without security, which advances, or some of them, were repaid to Chambers by Hughes by means of the loans made to the latter out of the trust funds. Chillingworth insisted that in this way, and without his knowledge, the trust money, or, at all events, about £1,500 of it had gone into Chambers' own pocket, and that Chambers had induced him, Chillingworth, to concur in the loans to Hughes, in order to have his, Chambers', advances repaid.

The summons came on for hearing before NORTH, J., on August 6, 1895.

Vernon Smith, Q. C., and *Hull*, for the plaintiff.—The loss should be borne equally; unless the trustees are equally liable, where one trustee is a beneficiary, the others will have less motive for carefulness. The utmost that the plaintiff can be liable for is the whole of the loss occasioned in respect of the mortgages made after he became bene-

ficiary, and one-half of the loss occasioned by the mortgages made before he became beneficiary; or at the very utmost his own one-fifth and one-half of the remaining four-fifths of the loss on the earlier mortgages; having borne the whole loss, he is entitled to contribution from his co-trustee at the very least in respect of the loss on the earlier mortgages; Lewin on Trusts, 9th ed., p. 1043; *Prime v. Savell*, W. N. (1867) 227; *Bahin v. Hughes*, 31 Ch. D. 390.

Swinfen Eady, Q. C., and *Tebbutt*, for the defendant.—Where a beneficiary is party to a breach of trust, the consequence of which is a loss to the trust funds, the trustee is entitled to indemnity from the beneficiary to the extent of the interest of the beneficiary in the funds; and he is not the less entitled to such indemnity if the beneficiary is a co-trustee acting in the breach of trust: *Raby v. Ridehalgh*, 7 De G., M. & G. 104. And this is so, notwithstanding the fact that the beneficiary only became a beneficiary after the breach of trust was committed: *Evans v. Benyon*, 37 Ch. D. 329.

Vernon Smith, Q. C., in reply.

NORTH, J.—I think that the conclusion at which the chief clerk has arrived is right, and that the motion to vary must fail. The facts are these: Mr. Chillingworth and Mr. Chambers are joint trustees, and they applied £8,650, part of the estate, upon investments which were unauthorized, which turned out to be deficient, and the loss upon which they are both liable to pay jointly and severally to the trust estate. The sum advanced was £8,650, the total loss was £1,580, leaving the amount received £7,070. I will consider how that ought to have been distributed. The beneficial interest was divisible in fifths; one-fifth of £8,650 is £1,730; therefore, when the mortgages were called in each of the five *cestuis que trust* ought to have received £1,730, but there was only £7,070 to pay them

with, which was insufficient for the purpose. Therefore, the £7,070 ought to have been applied first of all in paying to the four persons other than the plaintiff, who are each entitled to one-fifth, their full shares; and if there was nothing left, that fact could not have prejudiced the right of those four to be paid the full portion of their shares out of the fund. If that course had been taken the result would have been that £6,920 out of the £7,070 received would have been paid to those four persons. That would have left a sum of £150 only, and that sum only would have been available to meet the remaining one-fifth. The plaintiff would have been entitled to receive the whole of this one-fifth if the funds had been sufficient for the purpose, but there only being £150, that would have been all he could have taken out of the trust estate. That would have been the simple mode of dividing the fund at the time when it was received, but that course was not actually adopted. Both trustees of course were liable to the estate for the whole deficiency of £1,580, jointly and severally, and there being a sufficient sum in court on the separate account of the plaintiff, that was applied in making good the deficiency on the shares of the other beneficiaries. The making the loss good in that way seems to me to be form and not substance; it was machinery and nothing more. The simple mode of division is that I have stated, namely, the total sum received was divisible first of all in paying those four persons who were entitled to the four-fifths in full, and the balance only to the person who was entitled to the remaining fifth. The course that was actually adopted led to a form of inquiry being directed which would not have been necessary if the funds had been dealt with in the simple way I have suggested, from the fact that I have mentioned that the loss had been provided for out of money of the trustee. The finding upon that inquiry is that the whole of the sum of £1,580 ought to be ultimately borne and paid by the plaintiff Chillingworth—that is to say, he

is not entitled to call upon the defendant to recoup him any part of that sum. The course of events has rather disguised the simple aspect of the case, which is that which I must act upon. It seems to me that the money ought to have been divided in the proportions I have mentioned, a sum equal to four-fifths of the original trust fund going to pay those in full who had the four-fifth shares. As to the rest, all that was left would go to the plaintiff; but he could not be entitled to ask for anything more from his *cestuis que trust*. I think that is clearly settled by many cases, and I think the case of *Bahin v. Hughes*, 31 Ch. D. 390, referred to by Mr. Vernon Smith, bears me out. But then there is a circumstance I have ignored for the moment. I have treated the case as if the plaintiff had been entitled throughout to one-fifth of the whole. In point of fact, when the four first mortgages were made he was not entitled to any personal interest—he was a trustee only. The one-fifth that I called his at that time belonged to his wife, and she afterwards dying, he, as her administrator, became entitled to her fifth in those four mortgages which had been made in her lifetime. As regards those four mortgages they were made by him when he was not beneficially entitled, and it might be, in the absence of authority, that there would be a difference as to the mortgages made by him when he was a *cestui que trust* and those which were made by him when he was not a *cestui que trust*, though he afterwards became entitled under the person who at the time was a *cestui que trust*. As regards that point, the case of *Evans v. Benyon*, 37 Ch. D. 329, seems to me a clear authority that the fact that he did not become a beneficiary till after the breaches of trust were made cannot make any difference. At the time when the money came to be distributed he was entitled to one-fifth; and he being a trustee who concurred in the breach of trust, nothing whatever could go to him till all the other beneficiaries had been paid in full. When they had been paid in full he might take the

surplus, but he could not take anything more. That being so, he cannot come upon his co-trustee and ask for an indemnity by him in respect of what has taken place. It was suggested by Mr. Vernon Smith that as trustee he might be entitled to contribution from the other. That is ignoring altogether the important fact, recognized in *Evans v. Benyon*, 37 Ch. D. 329, that he became a beneficiary afterwards, and the investment thus was made for his benefit. It was an improper investment made for the purpose of getting a larger rate of interest than otherwise could be received, and therefore, in point of fact, he was bound to indemnify his co-trustee to the extent to which a benefit had been received. It is not necessary now to consider the sums that he actually did receive by way of income, because the one-fifth share coming to him is larger than the actual amount of the losses, and we need not therefore go any further. But in my opinion he could only take out of the proceeds the £150, the difference between his full share and that sum ; £1,580 is the loss that must be borne by him, and he cannot require contribution from his co-trustee. Under those circumstances the summons fails, and I must dismiss it.

The plaintiff appealed. The appeal was heard on January 21, 22, 23, 1896.

Warmington, Q. C., and Arnold Statham, for the plaintiff.— This is a case in which two trustees, the plaintiff and defendant, are jointly and severally liable to make good a breach of trust. As between themselves they are *in pari delicto*, and entitled to contribution from one another, so that a loss for which they are equally liable may be equally borne by both of them. Though each of the trustees is liable to pay the whole, the court will not allow the loss to fall entirely upon one of them, except under very special circumstances, as, for instance, in case one of them is a solicitor, or gets a personal benefit from the breach of trust :

Bahin v. Hughes, 31 Ch. D. 390; Baynard v. Woolley, 20 Beav. 583; Birks v. Micklethwait, 33 Beav. 409. Evans v. Benyon, 37 Ch. D. 329, was relied upon by NORTH, J., as an authority that the plaintiff in this case was not entitled to throw any part of the loss incurred upon the defendant, because the plaintiff was a beneficiary, and, no doubt, as between a mere beneficiary and trustee, concurrence by the beneficiary in a breach of trust operates as an estoppel against him; but that has never been so held as between two trustees, where both have concurred in a breach of trust. Why should the fact that one of the trustees becomes a beneficiary after the breach of trust has been committed make any difference? How can the fact that a trustee happens to be a beneficiary affect the principle that, as between trustees, there ought to be contribution in respect of losses caused by a breach of trust?

(KAY, L. J.—Has not the legislature, in effect, laid down, by § 6 of the Trustee Act, 1888, that a different principle is to be applied where one of the trustees happens to be a beneficiary?)

That section, which is said to have been founded on Raby v. Ridehalgh, 7 De G., M. & G. 104, only applies where the breach is committed at the instance of a beneficiary. If a breach of trust is committed at the instance of a beneficiary he cannot complain, and his interest is rightfully impounded to make it good: *In re Somerset*, [1894] 1 Ch. 231, 275. But this is not a case in which the breach of trust was committed at the instance or for the benefit of the plaintiff so as to give him more than he ought to have had. Even if the plaintiff, as *cestui que trust*, is liable to indemnify the defendant, the extent of the indemnity is not the amount of the plaintiff's share of the trust estate, but only the amount of the benefit actually derived by him from the breach of trust: Raby v. Ridehalgh, 7 De G., M. & G. 104. Again, Evans v. Benyon, 37 Ch. D. 329, is not an authority here. It turned upon the construction of the

deed in that case, and the beneficiary was not a trustee. This is the first case in which the person sought to be rendered exclusively liable for a breach of trust has been both beneficiary and trustee. What is sought to be applied in this case is not a statute, but an equity, and this equity ought not to be applied so as to work inequity. Can it be that if one of two trustees, who have both committed a breach of trust, induces the other to buy a sufficient share of the trust estate, the purchasing trustee becomes liable for the former joint breach of trust and the other trustee goes scot-free? Rules intended to work justice and fair dealing ought not to be so applied as to have the opposite effect; and this is a case in which there ought to be contribution. Moreover, the evidence shows that the defendant himself made, without the plaintiff's knowledge, a profit out of the breaches of trust by his building speculations with Hughes.

Swinfen Eady, Q. C., and *Tebbutt*, for the defendant.—Where a *cestui que trust* has concurred in a breach of trust he cannot himself take proceedings to render the trustee liable.

(KAY, L. J.—Supposing the *cestui que trust* obtains no benefit whatever from the breach of trust in which he has concurred, is he to pay over his share of the trust estate in order to make good the breach of trust?)

He cannot afterwards complain and make the trustees liable for what has been done with his consent. The innocent *cestuis que trust* must first be paid their shares; if that reduces the share of the guilty *cestui que trust*, he cannot take proceedings against the trustees to make good the amount by which his share has been diminished, for *volenti non fit injuria*. Supposing he is also a trustee, he cannot turn round and make his co-trustee liable because his share of the estate has been reduced by his own concurrence. He cannot take anything out of the estate until he has made good the loss, and he is in no different position because he

happens to be a *cestui que trust* as well as a trustee. The rule is that the loss must first come out of the estate that contributed to it: *Trafford v. Boehm*, 3 Atk. 440.

(KAY, L. J.—I do not see how a trustee who has concurred with his co-trustee in a breach of trust, is to be exonerated out of the estate of his co-trustee. Why should he say to his co-trustee, “You shall indemnify me out of your estate?”)

The trustee *cestui que trust* can take nothing till the breach of trust has been satisfied.

(LINDLEY, L. J.—The effect of that is that he pays the whole of the loss.)

(KAY, L. J.—If both are actually liable for the loss, why should one pay the whole?)

On the principle that the first property to be resorted to in order to make good the loss is the estate of the trustee beneficiary who assented to the breach of trust. No doubt the rule is that when a breach of trust has been committed there should be contribution as between the co-trustees; but when one of the trustees is also a *cestui que trust*, the loss falls primarily upon his share, for he cannot complain of a breach of trust in which he has acquiesced or concurred: *Lord Montford v. Lord Cadogan*, 17 Ves. 485; *Walker v. Symonds*, 3 Swanst. 1, 64, 75; *Booth v. Booth*, 1 Beav. 125; *Fyler v. Fyler*, 3 Beav. 550, 559, 560; *Lincoln v. Wright*, 4 Beav. 427, 431.

(LINDLEY, L. J.—To put your argument shortly, the trustee who has no interest has a lien on the share of the trustee who has.)

That is so. The rule must now be considered as well established that, as between *cestui que trust* and trustee, the latter can resort to the share of the *cestui que trust* who has concurred in a breach of trust; and the *cestui que trust* cannot be in any better position because he happens to be also a trustee: *Raby v. Ridehalgh*, 7 De G., M. & G. 104; *Sawyer v. Sawyer*, 28 Ch. D. 595, 598; *Evans v. Benyon*, 37 Ch. D. 329. As regards the allegation that the defendant made a

profit for himself out of the breaches of trust, the evidence shows that the plaintiff was all along perfectly cognizant of the defendant's transactions with Hughes. Upon all these grounds we submit that NORTH, J., was right.

Warmington, Q. C., in reply.—The defendant is bound at least to pay back what is proved to have gone into his own pocket through his building speculations with Hughes.

With regard to the cases cited on behalf of the defendant, the judgments proceeded on the grounds of the concurrence, instigation, persuasion or authority of parties who were not trustees at all, and these parties were rendered liable for the very reason that they were not trustees. The cases are those of the gratuitous interference by a beneficiary with a trustee's duty. There the beneficiary cannot be allowed to take advantage of his own interference. But the decisions cannot be applied to such a case as the present, where the plaintiff was a trustee and was bound to act and did act as such, without any instigation or authority from other parties. We have, therefore, here the case of two trustees committing a breach of trust, and the law of the court is that, as between them, there shall be contribution. There is no rule limiting the liability of trustees to bear the burden of a breach of trust ratably.

Cur. adv. vult.

Feb. 20, 1896.—LINDLEY, L. J., stated the circumstances under which the mortgage investments were made, pointing out that the investments were not unauthorized by the will and were not themselves breaches of trust. His Lordship then proceeded :

The plaintiff favored these loans to Hughes, both when his wife was alive and after her death, because Hughes was willing to pay, and did pay, 5 per cent. interest. On the other hand, it is proved that the defendant was mixed up with Hughes in building operations and was interested

in them, and that after the trustees had agreed to make an advance to Hughes the defendant frequently made him a temporary loan, intending that it should be repaid by Hughes as soon as he got money from the trustees, and it is proved, and in truth admitted by the defendant, that these temporary loans were so repaid. The amounts, however, of these temporary loans and repayments cannot now be accurately ascertained. They probably amounted to considerably more than £1,500. The plaintiff asserts that he knew nothing about these loans and repayments until quite lately; and his counsel contended that the defendant ought to be treated as having received the trust money himself to the extent of at least £1,580, and that the defendant was in strictness liable to make good the whole of the loss sustained by the trust estate, but that the plaintiff was content with one-half and did not ask for more. On the evidence, however, I am not satisfied that the plaintiff was so ignorant of these loans and repayments as he now says he was. No hidden scheme on the part of the defendant to get the moneys ostensibly for Hughes but really for himself is made out. Under these circumstances the repayments of the defendant's advances cannot be regarded as breaches of trust. Hughes was a mere borrower of trust money. His liability as regards the trust money lent to him was simply to repay it with interest. This was settled in *Stroud v. Gwyer*, 28 Beav. 130; and *Vyse v. Foster*, 8 L. R. Ch. 309. He therefore could pay the trust money away after he had borrowed it to any one, and no one taking it from him, even with notice of the source from which he obtained it, would incur any liability to the trustees who lent it, or to their *cestuis que trust*. See *Butler v. Butler*, 7 Ch. D. 116, 119, where the liability of persons dealing with borrowers of trust property is discussed. It is impossible, therefore, to treat the defendant as liable to make good the whole or even half of the loss on any such theory as that to which I am now referring.

But although the defendant is not bound to indemnify the plaintiff against the whole loss, it has to be considered whether the plaintiff is not bound to indemnify the defendant. I am not now alluding to the plaintiff as a *cestui que trust*. I will consider his position in that character presently. I am regarding him simply as a co-trustee. It sometimes occurs, though not often, that one co-trustee is bound to indemnify the other against all loss. Whether he is or not depends on what is just, as between the two, and this depends on what they have respectively done. See *Bahin v. Hughes*, 31 Ch. D. 390, and the cases there cited.

Now, in the present case, the improper investment which led to the loss was made, so far as the plaintiff was concerned, in order to obtain a high rate of interest for the benefit of his own wife so long as she lived, and for the benefit of the plaintiff himself after her death. If, then, the defendant had not been interested in procuring advances for Hughes, it would require consideration before holding it to be just, as between the plaintiff and the defendant, to throw any part of the loss upon the defendant. In the case supposed, the defendant would have strong grounds for contending that he was entitled to be indemnified against all loss by the plaintiff. It is, however, unnecessary to decide how this would have been; because, although no such scheme on the part of the defendant as I have before alluded to is proved, yet it is proved that the defendant was interested in keeping Hughes afloat and in facilitating borrowing by him; and I cannot avoid the conclusion that the plaintiff and the defendant, for personal reasons of their own, although for different ends, were both ready to run risks which, as trustees, they ought not to have run, and were too lax in seeing after the sufficiency of the securities they took. As between the plaintiff and the defendant, therefore, if the plaintiff had no beneficial interest in the estate, the ordinary right of one trustee to contribution from his co-trustee would exist.

Having arrived at this conclusion it is necessary to consider what the effect is of the circumstance that the plaintiff became entitled to his wife's one-fifth share in the trust estate when she died. The plaintiff contends that if two trustees are jointly and severally liable to make good a breach of trust, and are as between themselves *in pari delicto*, they are, as between themselves, entitled to contribution so as to equalize the loss to which both are equally liable. The plaintiff further contends that the fact that on the death of his wife he became beneficially entitled to a share of the trust property does not deprive him of his right to contribution from his co-trustee. On the other hand, it is contended by the defendant that a *cestui que trust* who concurs or acquiesces in a breach of trust cannot obtain any relief against his trustee. The defendant further contends that this principle applies, not only when the *cestui que trust* is not himself a trustee, but also when he is; and that the same principle applies even although the person filling both characters does not become a *cestui que trust* until after the breach of trust has been committed.

NORTH, J., in his judgment, first pointed out that, as between the beneficiaries, the plaintiff's share was primarily applicable and had been properly applied to make good the loss arising from the breach of trust, and then he held, on the authority of *Evans v. Benyon*, 37 Ch. D. 329, that the plaintiff was precluded from throwing any part of that loss on the defendant. *Evans v. Benyon*, 37 Ch. D. 329, however, was not a case of co-trustee at all. The court did decide that a person who instigated a breach of trust could not, when he himself became a beneficiary, compel the trustees to make good the loss occasioned by such breach. It is, therefore, an authority for saying that if the plaintiff had not been himself a trustee his conduct before he became a *cestui que trust* would have precluded him from obtaining relief against the defendant in respect of the breach of trust which the plaintiff concurred in, as above stated.

In order to determine the rights of the parties it is necessary to consider—first, the plaintiff's right in his character of trustee against the defendant; and, secondly, the defendant's right against the plaintiff in his character of *cestui que trust*. To the extent to which the plaintiff's right as trustee is neutralized by his obligation as *cestui que trust* he will have no right to contribution. But except so far as it is thus neutralized, his right to contribution will remain. In other words, if the plaintiff as trustee is entitled to throw half the loss on the defendant, and if, on the other hand, the defendant is protected against any claim of the plaintiff in respect of his share of the trust estate, then, as that share exceeds half the loss, the plaintiff will not be entitled to anything from the defendant, and must bear the whole loss which it has sustained. On the other hand, if the plaintiff as *cestui que trust* is not precluded from recovering from the defendant so much as one-half the loss, the plaintiff's right as co-trustee to contribution from the defendant will still be enforceable for the excess. This, in my opinion, is how the conflicting rights of the two parties have to be adjusted, and it only remains to work them out.

The plaintiff and defendant being *in pari delicto*, the plaintiff's right as trustee to contribution from the defendant as co-trustee to the extent of one-half the loss is established by a long series of authorities, of which it is only necessary to mention *Lingard v. Bromley*, 1 Ves. & B. 114, and *Bahin v. Hughes*, 31 Ch. D. 390. On the other hand, the right of the defendant as trustee to be indemnified out of the share of the plaintiff as *cestui que trust* against the consequences of a breach of trust committed at his request and for his benefit is equally indisputable. It was treated by Lord ELDON as clear law in his day that a *cestui que trust* who concurs in a breach of trust is not entitled to relief against his co-trustee in respect of it. See *Walker v. Symonds*, 3 Swanst. 1, 64. In *Lewin on Trusts*, 8th ed., p. 918; 9th ed., p. 1053, many other authorities will be found to the

same effect; and Lord ELDON's statement of the law was distinctly approved and followed in *Farrant v. Blanchford*, 1 De G., J. & S. 107. Moreover, as already pointed out, it was decided in *Evans v. Benyon*, 37 Ch. D. 329, that this doctrine applies to a person who becomes a *cestui que trust* after his concurrence. Further, in *Butler v. Carter*, 5 L. R. Eq. 276, 281, Lord ROMILLY stated distinctly that where one of two trustees was himself a *cestui que trust* he could not call upon his trustee to replace stock which they had both permitted to be misapplied.

These cases are all based on obvious good sense; for if I request a person to deal with my property in a particular way and loss ensues, I cannot justly throw that loss on him. Whatever our liabilities may be to other people, still, as between him and me, the loss clearly ought to fall on me. Whether I am solely entitled to the property, or have only a share or limited interest, still the loss which I sustain in respect of my share or interest must clearly be borne by me, not by him. This rule is eminently just in such a case as this, in which the plaintiff, who seeks relief, has concurred in a long series of breaches of trust, and has, since he became a *cestui que trust*, confirmed all the breaches of trust which he and the defendant committed at an earlier period.

The plaintiff contended, on the authority of *Raby v. Ridehalgh*, 7 De G., M. & G. 104, that the plaintiff's liability as *cestui que trust* to indemnify the defendant, and the extent of the plaintiff's inability to obtain relief against the defendant, was limited, not by the amount of the plaintiff's share in the trust estate, but by the benefit derived by the plaintiff from the breach of trust. But I do not understand *Raby v. Ridehalgh*, 7 De G., M. & G. 104, to go as far as this. The question there was to what extent two tenants for life were bound to indemnify their trustees in respect of certain breaches of trust. The master found that the tenants for life had benefited by these breaches, and had requested the

trustees to invest the trust money on mortgage, but that the two tenants for life had not instigated or authorized the particular investments which led to the loss which the trustees were ordered to make good. The Vice-Chancellor held each of the tenants for life personally liable for the whole loss. The court of appeal corrected this, and decided first that the liability of the tenants for life was not a personal liability to indemnify the trustees, but was confined to the beneficial interests of the tenants for life; and the court decided, secondly, that the liability of the tenants for life was limited to the amounts they had respectively received, and did not extend to what other tenants for life had received, nor to what the trustees had not paid over to any one. This, under the circumstances of that case, was quite right. The whole of the life interests of the tenants for life were, however, charged with the repayment of what they were held liable for. In varying the order appealed from, the court of appeal treated the corrections which it made as formal rather than substantial, and I do not understand the decision to go further than I have stated; nor is there any reason to suppose that the doctrine as laid down by Lord ELDON was in any way considered incorrect. Suppose a *cestui que trust* in remainder to induce his trustees to commit a breach of trust for the benefit of the tenant for life—perhaps his own father or mother—can such a remainderman compel the trustees to make good the loss or resist their claim to have it made good out of his interest when it falls in if some other *cestui que trust* compels them to make the loss good? I apprehend not; and yet, in the case supposed, the *cestui que trust* in remainder might not himself have derived any benefit at all from the breach of trust. The 6th section of the Trustee Act, 1888, (51 & 52 Vict. c. 59) appears to be based on this view of the law, and under that section (if it applied) it would, in my opinion, be just to impound the whole of the plaintiff's beneficial interest to indemnify the defendant.

On these grounds I am of opinion that the decision appealed from is right, and that the appeal must be dismissed with costs.

KAY, L. J.—A claim is made by the plaintiff, one of two trustees, against the defendant, his co-trustee, for contribution of one-half the loss occasioned by a breach of trust committed by both by investing part of the trust money on insufficient security.

When trustees are equally to blame for a breach of trust, and are made jointly and severally liable to the *cestui que trust* if one of whom [*sic*] pays the whole, his right to enforce contribution from his co-trustee is clear.

In *Lingard v. Bromley*, 1 Ves. & B. 114, Sir W. GRANT, M. R., distinguished such a case from an ordinary tort, and had no doubt about the right to contribution. He there said: "There are, no doubt, many cases in which persons may be all liable, severally as well as jointly, to indemnify a third party, and yet ought not in equity to bear the burthen equally among themselves." The plaintiff and defendant in that case were assignees in bankruptcy, and the master of the rolls points out that the plaintiff, who had filed the bill to obtain contribution, had not derived any exclusive benefit from the breach of trust, and that the defendants were not excused, because they had left the matter in the plaintiff's hands, and did what he desired without examining into the matter. This was followed by the court of appeal in *Bahin v. Hughes*, 31 Ch. D. 390. The care with which the court, in administering equity between the trustees, looks into all the circumstances, is illustrated by *Lockhart v. Reilly*, 25 L. J. Ch. 697, where a loss was occasioned by an improper investment on mortgage made by two trustees, one of whom was a solicitor and acted as solicitor in the matter, and negotiated the mortgage in favor of a mortgagor with whom he was connected. Lord CRANWORTH, L. C., held him to be primarily liable as be-

tween himself and his co-trustee, and said that the fact of his acting as solicitor would not alone be sufficient to justify this result. The same thing was held in *Thompson v. Finch*, 8 De G., M. & G. 560.

It seems to be essential to this claim for equal contribution that the trustees should be equally to blame for the breach of trust, and that neither of them should have derived an exclusive benefit from the breach of trust. (His Lordship then stated the facts of the case, and proceeded:)

The whole of the loss, £1,580, has been recouped out of the plaintiff's share of the testator's estate. He seeks now to charge his co-trustee with £790, being one-half the amount which has been so paid. The plaintiff was interested, at first through his wife and afterwards personally, in making these investments. Some of them were in existence at the death of his wife, and since her death he has been personally entitled to her share, and some of the investments have been made since. He has maintained in this litigation that they were proper investments. He derived a benefit from the breach of trust, and if the co-trustee did not, the plaintiff, according to *Lingard v. Bromley*, 1 Ves. & B. 114, would be primarily liable as between himself and his co-trustee.

But, then, it is argued that he did not derive an exclusive benefit, but that the defendant took another much larger advantage. The case was opened as one in which the defendant was engaged with Hughes in his building speculation, and made advances to him from time to time without security, and that this was unknown to the plaintiff, and that the defendant induced the plaintiff to concur in lending the trust money to Hughes in order that Hughes might repay to the defendant out of such moneys the amount due to the defendant, and that Hughes in fact did so, and that the trust money went into the pocket of the defendant. On the other hand, it was not denied that Hughes did pay some of the moneys he so received to the defendant, but it

was said only advances made by the defendant to Hughes when a loan from the trust estate had been agreed on, and such advances were made in anticipation of the actual loan.

The evidence is not clear on the point. (His Lordship then reviewed the evidence on this point, and proceeded:)

I cannot resist the conclusion that Chillingworth was aware that Chambers was a creditor of Hughes when the mortgages in question, or some of them, were made, and that he knew that the money borrowed was, sometimes at any rate, applied by Hughes in payment of his debt to Chambers.

In *Butler v. Butler*, 5 Ch. D. 554; on appeal, 7 Ch. D. 116, one trustee filed a bill against another, claiming to make him primarily liable for a deficiency of mortgages made to a builder who repaid to the defendant trustee a large part of such moneys for debts from him to such trustee for the purchase money of the land and on account of advances made by him to the mortgagor. The plaintiff was aware that some payments were so made, but he did not know the amount. FRY, J., before whom the case first came, asked if there was any case in which such an indirect benefit had been held to make the trustee who received it primarily liable, and refused to do so; and this was supported in the court of appeal, JAMES, L. J., saying that, in the absence of fraud, such a claim was too remote.

Suppose, then, that the plaintiff was thus directly or indirectly interested in lending the trust money to Hughes, and must be treated as having exclusively benefited by the breach of trust, the question is whether he is primarily liable to the extent of his one-fifth share of the estate. It was argued that all the estate recovered must first be applied to pay the other four-fifth shares, and that the plaintiff has no right to contribution for the deficiency to pay his share.

In *Trafford v. Boehm*, 3 Atk. 440, trust funds were settled by a marriage settlement (*Id.* 442) on husband for life,

wife for life, and then for children, and, if none, to the husband. With the concurrence or subsequent consent of the husband an improper investment was made of the trust fund, which resulted in a loss; and after the death of the husband his widow filed a bill against the trustees of the settlement to recover the trust fund. The surviving trustee of the settlement filed a cross bill to be indemnified against the loss. Lord HARDWICKE held that the estate of the husband was primarily liable. He said, 3 Atk. 444: "The rule of the court in all cases is, that if a trustee errs in the management of the trust, and is guilty of a breach, yet, if he goes out of the trust with the approbation of the *cestui que trust*, it must be made good first out of the estate of the person who consented to it." That this is the rule in the case of a person, *cestui que trust* at the time, assenting to a breach of trust, is established by dicta, at least in many cases. I take as an example Lord LANGDALE's words in *Lincoln v. Wright*, 4 Beav. 432: "Nothing can be more clear than the rule which is adopted by the court in these cases, that if one party, having a partial interest in the trust fund, induces the trustee to depart from the direction of the trust for his own benefit, and enjoys that benefit, he shall not be permitted, personally, to enjoy the benefit of the trust whilst the trustees are subjected to a serious liability which he has brought upon them. What the court does, in such a case, is to lay hold of the partial interest to which that person is entitled, and apply it, so far as it will extend, in exoneration of the trustees, who, by his request and desire or acquiescence, or by any other mode of concurrence, have been induced to do the improper act."

In *Walker v. Symonds*, 3 Swanst. 64, Lord ELDON said: "It is established by all the cases, that if the *cestui que trust* joins with the trustees in that which is a breach of trust, knowing the circumstances, such a *cestui que trust* can never complain of such a breach of trust. I go further, and agree that either concurrence in the act, or acquiescence without

original concurrence, will release the trustees; but that is only a general rule, and the court must inquire into the circumstances which induced concurrence or acquiescence; recollecting, in the conduct of that inquiry, how important it is, on the one hand, to secure the property of the *cestui que trust*, and, on the other, not to deter men from undertaking trusts, from the performance of which they seldom obtain either satisfaction or gratitude." This refers only to an attempt by the *cestui que trust* to make the trustee liable for any loss which the *cestui que trust* may suffer by reason of a breach of trust which he instigated or concurred in. Such a claimant is estopped by his concurrence in the breach of trust. But, as I have shown, the estoppel does not exist when the claim is for contribution by one trustee against another. The fact of the claimant being equally to blame for the breach of trust does not bar such a claim.

Then, what difference does it make that the trustee so claiming is also interested in the trust estate? If he takes no benefit directly or indirectly by the breach of trust, can his interest be laid hold of to indemnify his co-trustee? If he does benefit, is the whole of his interest liable, or only to the extent of the benefit received? The decisions and dicta on this question are not easy to reconcile.

In *Booth v. Booth*, 1 Beav. 125, where the testator's widow, who was entitled to the income of the residue till his youngest child attained twenty-one, concurred in a breach of trust by the trustees carrying on the business of the testator whereby his capital in that business was ultimately lost, Lord LANGDALE said, *Id.* 130: "That the widow concurred seems to be quite clear, and any interest to which she may be entitled is the proper fund to resort to in the first instance. If she has obtained any benefit from the breach of trust, the trustee ought to be compensated in respect of it." That seems to indicate a limitation of the liability to the amount of the benefit derived by the beneficiary.

The question came before the court of appeal, and seems to have been carefully considered, in *Raby v. Ridehalgh*, 7 De G., M. & G. 104, where tenants for life of equal half shares in the trust estate induced the trustees to lend the trust money on mortgage so as to secure a higher rate of interest than the public funds in which the trustees desired to invest. There were no powers of investment in the will creating the trust. The tenants for life did not request the trustees to invest in the particular mortgages which turned out deficient. The trustees were held liable for the loss, and it was declared by the original order that the life interests of the tenants were liable to recoup the trustees in terms which would make such life interest liable to its full extent, and each also liable for the whole deficiency. On appeal, TURNER, L. J., intimating that the court did not go the length of ordering the *cestuis que trust* personally to recoup the trustees, and doubting whether the trustees had any power to invest on mortgage, and holding the trustees liable, continued thus, *Id.* 109: "The next question is, what is the extent of liability which attaches upon the *cestuis que trustent* for life in consequence of their having induced the trustees to commit the breach of trust?" He then points out that they had received the income of the improper investments, and that the trustees were entitled to stand in the place of remaindermen, "for the purpose of recovering against the *cestuis que trustent* for life who instigated the breach of trust, or their estates, the benefit actually received by them in consequence of such breach of trust." One tenant for life, John Spencer Raby, was living, the other, William Raby, had died since the institution of the suit. The decree was altered and, as altered, declared that J. S. Raby and the estate of W. Raby, were respectively liable, to the extent of the interest on the mortgages received by them respectively, to make good to the trustees the amount they had to pay, and that the life estate of J. S. Raby, and what was due in respect of the life estate of

W. Raby, were respectively liable to pay the amount for which each of them were respectively so liable. TURNER, L. J., expressly treats the tenants for life as having instigated the breach of trust, and particularly pointed out that the life interest of each *cestui que trust* ought not to be made liable for the whole, but each estate only for so much of the income of the improper investments as each tenant for life had respectively received. If these receipts were not sufficient to recoup the trustees in full, it would seem that the court considered that the rest of the loss must be borne by them, and this was the effect of the decree as altered.

Here we have a plaintiff who was both trustee and also *cestui que trust* as to one-fifth of the property; and, if the cases I have referred to apply, it follows that he is not estopped by his concurrence in the breach of trust from claiming contribution. But as *cestui que trust* he is prevented from requiring the trustees to make good any loss sustained by him in that character. The loss he seeks to make his co-trustee share is not the loss of his one-fifth share as *cestui que trust*, but the amount he has to pay as trustee to recoup the deficiency of the trust estate. If he is primarily liable to the extent of his one-fifth share, this claim must fail. If liable only to the amount of the benefit received from the improper investment, the balance of the loss, after deducting that amount, should be shared by himself and his co-trustee.

On the whole, I think that the weight of authority is in favor of holding that a trustee who, being also *cestui que trust*, has received, as between himself and his co-trustee, an exclusive benefit by the breach of trust, must indemnify his co-trustee to the extent of his interest in the trust fund, and not merely to the extent of the benefit which he has received. I think that the plaintiff must be treated as having received such an exclusive benefit.

I am of opinion, for these reasons, that the plaintiff's action fails, and the appeal must be dismissed.

It is said that § 6 of the Trustee Act, 1888, does not apply to this case; I suppose because this proceeding was pending at the passing of that act. The statute does not define the extent of the liability of a concurring beneficiary. The 6th section is rather addressed to describe the case in which the court may, if it shall think fit, impound all or any part of the interest of the beneficiary by way of indemnity to the trustee, and also to provide that consent of a beneficiary for this purpose must be given in writing.

A. L. SMITH, L. J., after stating the facts, proceeded: There appear to be three rules which have application to a case like the present, and may be shortly stated as follows: (1) that a *cestui que trust* cannot make a trustee liable for losses occasioned to him by a breach of trust which the *cestui que trust* has authorized and consented to; (2) that in such a case a trustee is entitled to be recouped out of the interest of the *cestui que trust* in the trust funds any loss he may sustain by reason of his having to make good such breach of trust; and (3) that, as between two trustees who are *in pari delicto*, the one who has made good a loss occasioned by a breach of trust for which the two are jointly and severally liable may obtain contribution to that loss from the other.

The question is how these rules are to be applied in the present case.

As to the existence of the first rule, Lord ELDON, as long ago as the year 1818, in *Walker v. Symonds*, 3 Swanst. 64, states: "It is established by all the cases, that if the *cestui que trust* joins with the trustees in that which is a breach of trust, knowing the circumstances, such a *cestui que trust* can never complain of such a breach of trust." And in 1841 Lord LANGDALE, in *Fyler v. Fyler*, 3 Beav. 560, states the rule as follows: "If all this has taken place"—that is, the breach of trust—"with the consent of the parties now complaining, it certainly appears to me that they would not

have any right to maintain this suit, for *volenti non fit injuria*. If they have authorized this course of dealing with their own fund, it would be in the highest degree unjust to permit them to establish a claim against those who have acted under their authority."

As to the second rule, this was held by Lord HARDWICKE, in the year 1746, in *Trafford v. Boehm*, 3 Atk. 444: "The rule of the court in all cases is, that if a trustee errs in the management of a trust, and is guilty of a breach, yet if he goes out of the trust with the approbation of the *cestui que trust*, it must be made good first out of the estate of the person who consented to it." And Lord LANGDALE, in *Lincoln v. Wright*, 4 Beav. 432, states the rule thus: "Now, nothing can be more clear than the rule which is adopted by the court in these cases: that if one party, having a partial interest in the trust fund, induces the trustee to depart from the direction of the trust for his own benefit, and enjoys that benefit, he shall not be permitted, personally, to enjoy the benefit of the trust, whilst the trustees are subjected to a serious liability which he has brought upon them. What the court does, in such a case, is to lay hold of the partial interest to which that person is entitled, and apply it, so far as it will extend, in exoneration of the trustees, who by his request and desire or acquiescence, or by any other mode of concurrence, have been induced to do the improper act."

The judgment of TURNER, L. J., in *Raby v. Ridehalgh*, 7 De G., M. & G. 104, appears to me to proceed upon the same principle, for he held *cestuis que trust* who had been privy to and instigated a breach of trust liable out of the trust shares to recoup the trustees.

A question has arisen under this judgment as to what amount of the *cestui que trust* interest the trustee is entitled to impound.

For the reasons given by LINDLEY, L. J., I am of opinion that TURNER, L. J., did not intend to cut down the rule

which had theretofore, in my opinion, existed, namely, that a trustee may be entitled to impound the *cestui que trust's* interest in so far as it will go to recoup him for the losses he has had to make good. It is not stated whether the amount impounded in this case was not sufficient to indemnify the trustees.

I do not doubt, had the plaintiff in the present case not been a co-trustee with the defendant, but only a *cestui que trust* of the estate of which the defendant was trustee, that, inasmuch as the plaintiff had authorized and consented to the breach of trust which is now complained of, he could not have claimed contribution from the defendant to make good the loss he had sustained; and, what is more, that the defendant would have been entitled to impound the plaintiff's interest in his one-fifth share to exonerate him from any loss he might have been called upon to make good by reason of the breach of trust.

(His Lordship then considered the evidence upon the question whether there had been any concealment from the plaintiff on the part of the defendant of the fact that Hughes, out of the advances made to him out of the trust funds, repaid the temporary loans made to him by the defendant, and held that no concealment had been established against the defendant, and that the plaintiff was well aware of the circumstances under which the advances of the trust funds were made. His Lordship then proceeded:)

It appears to me that the truth as to the motives of the plaintiff and the defendant is that the plaintiff was desirous of obtaining a higher rate of interest for his wife, and afterwards for himself, than he otherwise would have obtained had the trust funds not been lent to Hughes upon mortgage; and that the defendant was desirous that Hughes should have the trust money advanced to him upon mortgage, for it bettered his chance of being paid by Hughes that which Hughes might owe to him.

I now come to the third rule, which is, that where two

trustees concur in committing a breach of trust, and are *in pari delicto*, the one, if he has made good the loss occasioned thereby to the trust estate, can obtain contribution from the other. The existence of this rule is not disputed at the bar: see *Lingard v. Bromley*, 1 Ves. & B. 114.

The real question is, How is this rule to be applied in the present case, which arises not between two trustees who are merely trustees, but between a trustee who is also a *cestui que trust* and his co-trustee who is not?

In my judgment, the true view is that the plaintiff in this case can only bring into play the third rule (that is, the rule as to contribution between co-trustees) if and when he has made good to the *cestuis que trust* any loss they have sustained by reason of the breach of trust complained of over and above his share in the trust property; but this he has not done.

As before stated, if he had not made good this loss, and the defendant had, the plaintiff's share could have been impounded for that purpose by the defendant until he had been recouped what he had paid; and the plaintiff, therefore, is in not a position to ask for contribution from the defendant until the plaintiff had paid more than the amount of his share. When he had done so, then, it seems to me, he would have been entitled to ask for contribution towards what he had paid over and above his interest in the trust funds. But there yet remains to the plaintiff of his share in the trust funds the sum of £150, and consequently, in my judgment, there is nothing upon which the plaintiff can bring into play the operation of rule three.

For these reasons I think that NORTH, J., was quite right in deciding as he did, that the plaintiff was entitled to no contribution from the defendant. This appeal must be dismissed.

Contribution — Shipping — General Average—Fault of Vessel.

PACIFIC MAIL STEAMSHIP CO. v. NEW YORK,
H. & R. MINING CO.

SAME v. CALIFORNIA VINTAGE CO.

(Circuit Court of Appeals, Second Circuit. May 27, 1896.)

(74 Fed. Rep. 564; affirming in part 69 Fed. Rep. 414.)

The fact that the vessel is in fault in creating the danger to avert which the sacrifice is made is no ground for denying the right of contribution, as between the cargo owners, though it prevents the vessel owner from sharing therein : affirming 69 Fed. Rep. 414.

When a general average loss was incurred through a danger caused by the negligence of the master, and the proceeds of the vessel, in proceedings for limitation of liability, were distributed among the cargo owners, *held*, that, on a subsequent adjustment in general average, cargo owners who had filed claims in the limited liability proceedings were entitled, with the others, to the benefit of the adjustment : affirming 69 Fed. Rep. 414.

When a vessel was stranded upon a reef, and the master jettisoned part of the cargo, then flooded the ship to prevent a total loss from pounding, and afterwards the ship and the cargo remaining in her were salvaged, *held*, that these measures were not for the benefit of the ship alone, but for the cargo as well, and, hence, that it was a case for general average : affirming 69 Fed. Rep. 414.

Proceeds of the ship, paid to various cargo owners in limited liability proceedings prior to the general average adjustment, are to be taken into account in the adjustment, in the same manner as if such proceeds still remained in the registry ; and cargo owners who did not appear in the limited liability proceedings are entitled to receive the same benefit from the proceeds of the ship as those who had proved their claims : affirming 69 Fed. Rep. 414.

When, after a stranding, and before salvage operations were begun, specie was sent back to the port of shipment, and thence sent forward by another vessel of the same line, and delivered to the consignees, *held*, that such a separation was thereby effected from the rest of the adventure that the specie was not bound to contribute to the salvage expenses : reversing 69 Fed. Rep. 414.

Appeal from the District Court of the United States for the Southern District of New York.

Lewis Cass Ledyard, for New York, H. & R. Mining Co.

J. Langdon Ward, for California Vintage Co.

Harrington Putnam, for Pacific Mail Steamship Co., as trustee.

Before WALLACE, LACOMBE and SHIPMAN, Circuit Judges.

SHIPMAN, C. J.—These two appeals are from decrees of the district court for the Southern District of New York, upon libels *in personam*, brought by the Pacific Mail Steamship Company, as trustee, to recover from the respondents, who were cargo owners, the amount claimed to be due upon general average bonds. See 69 Fed. Rep. 414.

The "City of Para," a steamship belonging to the libellant, sailed from Aspinwall for New York on May 16, 1888, having on board a large general cargo, valued at \$233,561.76. On the next evening, at 10.24 P. M., through the negligence of the master, she stranded upon a reef extending from the southwest corner of Old Providence Island. He forthwith attempted to lighten the ship by throwing some cargo overboard, ineffectually backed the engine, and on the next morning made another unsuccessful attempt to free the vessel from the reef by backing her and heaving upon a hawser and kedge anchor which had been gotten out. The master saw that assistance was necessary, and on May 18 sent a schooner, with an officer, to Aspinwall to notify the owners and obtain help. The steamer began to pound upon the reef, with great danger that she would knock out her stern and knock holes in her bottom. The master, about noon of that day, let water into the engine room and boiler room, so that she might lie steadily; but it was found that water was leaking into all the compartments, and it was determined to open the valves, and let the ship fill fore and aft. This was done, and the vessel lay thereafter motion-

less. On May 19 the "Madrid," a small steamer, bound for Aspinwall, appeared, and carried to Aspinwall some of the passengers and Captain Dow, the agent of the steamship company, who happened to be on board the "City of Para." Upon reaching Aspinwall he chartered the "Thames," a steamer which reached the island May 25, and carried back the remaining passengers, the baggage, the specie and bullion on board, amounting to about \$30,000, and some coffee. Sixteen bars of bullion, valued at \$21,895.32, which belonged to the defendant, the New York, Honduras & Rosario Mining Company, were sent from Aspinwall by the steamship company in one of its other steamships to New York, consigned to itself, and were delivered to the mining company June 7, upon its signing an average bond. The steamship company, on May 23, contracted in New York with the Merritt Wrecking Company to go to the assistance of the wrecked steamship upon a salvage compensation to be determined, in the case of success, by the parties in interest, but the wrecking company was to receive \$5,000 in any event. Its wrecking steamer reached Old Providence Island May 29, and, after some of the perishable cargo which remained on board the steamship after May 25, had been thrown overboard on account of its unhealthfulness, the efforts of the wrecking company were successful, and the steamer was taken from the reef on June 9. That portion of the cargo which had been temporarily landed or placed in lighters was replaced in the steamer, and she arrived in New York on June 30 with her remaining cargo on board. The salvage which was paid was \$25,000.

The steamship company thereupon filed a libel in the district court to limit its liability to cargo owners to the value of the ship and freight, and such proceedings were had that the value of the steamer, immediately after the accident, was found to be \$35,869.84, and the proved claims were found to be about \$110,000. The vessel was found to

have been stranded by the negligence of the master, and the appraised value was distributed proportionally among the several claimants, so that each received a dividend of about 32.4 per cent. The general average adjustment was then made. The total amount received by the cargo owners from the ship was deducted from the total loss. The average loss was then ascertained by comparing the value of the saved cargo with the loss as thus reduced, and the amount which each owner should pay or receive was ascertained by comparing his actual loss with the original value of his goods. In the settlement he was charged with what he had received from the ship. The bullion contributed to the expenses of the salvage services which were performed after it had been removed from the vessel. The district court was of opinion that the adjustment of the general average had been made upon correct principles, sustained it, and entered decrees for payment accordingly. The mining company appealed from the decree against it, upon the ground that under the facts no proper subject for general average existed, that the adjustment was not made upon proper principles as to any cargo owner, and that in its especial case it was improperly compelled to contribute to the losses and expenses subsequent to the removal of the bullion.

Its first point is that, the losses and expenses having been occasioned by the fault of the master in negligently permitting the vessel to be stranded, were not a proper subject for general average. The law of the sea, which first established the doctrine of general average, placed itself upon the equitable principle that those who put the property which they separately owned to the hazards of a common peril should bear proportionally the losses which an innocent owner had endured by the sacrifices of his property in successfully saving the other owners from the common dangers; and therefore it did not allow the owner of the vessel or cargo, who was in fault, and who produced the

calamity, by himself or by his agent, to share in the contributions from the other sufferers. "No one can make a claim for general average contribution if the danger to avert which the sacrifice was made has arisen from the fault of the claimant, or of some one for whose acts the claimant has made himself, or is made by law, responsible towards the co-contributors:" Lown. Gen. Av. (4th ed.) 34. The appellant seeks to broaden the principle, and make it assert that no general average can exist if the ship owner or his servants created the danger to relieve from which the sacrifice was made. This proposed enlargement would turn the equities of general average into injustice, for it would compel innocent cargo, which had been sacrificed to cure the consequences of the vessel's fault, to suffer alone, although it had freed the rest of the cargo from peril. It is true that the owner of the vessel cannot claim contribution, and is also liable for indemnity to the cargo which has been sacrificed. But the fact that the vessel was in fault presents no equitable reason for preventing the cargo owner from his right of contribution from the owners of the saved cargo, and gives them no just reason for refusing to contribute. When the calamity which was initiated by the fault of the master is imminent, it is his duty to take measures to overcome his mistake, and, if necessary, he has the power of sacrificing a portion of the cargo to save the residue; but his previous fault does not impair the cargo owner's equitable right to receive compensation, if his sacrifice has saved the property of others.

The doctrine of the appellant is not enforced by a decision either of the English or our own courts. On the contrary, it was condemned by the Privy Council in *Strang v. Scott*, 14 App. Cas. 601, a case in which innocent cargo had been sacrificed to save the vessel from perils directly occasioned by the fault of the master. The substance of the Privy Council's opinion was that the master's negligent navigation afforded no "pretext for depriving the shippers,

whose goods were jettisoned, of their claim for a general contribution." Lord WATSON, in delivering the opinion, said: "The owners of goods thrown overboard, having been innocent of exposing the 'Abington' and her cargo to the sea peril which necessitated jettison, their equitable claim to be indemnified for the loss of their goods is just as strong as if the peril had been wholly due to the action of the winds and waves." The decision in *The Carron Park*, 15 Prob. Div. 203, is to the same effect.

The appellant deemed itself supported in its view by the opinion of learned French text writers who were discussing the question with particular reference to the provisions of the French Code. The German and Danish Commercial Codes and the law of Italy seem to be in harmony with the decision of the English Privy Council.

The appellant next says that the adjustment was incorrect, because the cargo owners who filed claims in the limited liability proceedings against the proceeds of the steamship are estopped from alleging that their loss was occasioned by a general average act, inasmuch as the two modes of procedure are alleged to be inconsistent with each other. The theory is that the cargo owner, in his claim under the limited liability proceedings, treated his loss as the result of a wrongful act, and that in general average he treated it as the result of a rightful act. The theory takes no cognizance of the fact that the liability of the steamship is for the negligent act of its captain in stranding the vessel, while the liability of the cargo owners is to contribute for the jettisoning of part of the cargo to save the vessel and the rest of the cargo. The acts are different, and are of different character. The first act was the negligence which injured; the second was the sacrificial act which attempted to save the cargo.

The appellant next says that no one of the acts of the master or owner was of avail in saving, or was intended to save, the cargo; that the jettison, the flooding and the sal-

vage services were all for the benefit of the ship ; and that the non-perishable cargo was never in danger, but was safe in the hold. It may be regarded as settled that the expense of an act or of a series of acts, or the loss occasioned by such acts, for the benefit of the ship alone, or for the benefit of the cargo alone, is not to be contributed for in general average, but that the acts must be for the common good. The view which the appellant takes of the condition of the cargo when the vessel began to pound is somewhat superficial. Her misfortune was not about to be confined to herself ; for, if she continued to pound, not only her stern and her bottom would be broken, but her rescue as a laden ship would be defeated, and her cargo must be taken out piecemeal and sent to Colon to be transshipped, or sent to New York in rescuing vessels. The ordinary result of this method of saving a cargo in a place remote from the terminus of the voyage is destructive of its pecuniary value ; and while, to use an illustration of Mr. Lowndes, if a tight and staunch vessel has touched bottom upon a mud bank in port, where there is no danger of injury to the cargo, the expenses of pulling the vessel off might not be a part of general average, the condition of the cargo in the hold of a steamship bound for New York which is pounding on a coral reef on the corner of an island near South America presents a state of facts which lead to a different result. The effect of the flooding was to protect the ship from most serious injury, and to diminish the expenses of saving the cargo, and the effect of the salvage expenses was to bring both to port with much less pecuniary loss than would have otherwise happened.

The next point which is made by the appellants is that the principle upon which the general average adjustment was made up was incorrect. The method upon which the adjustment was made has been described, and it is claimed to have been improper, because it redistributes the amount paid under the decree in the limited liability proceedings.

A distribution under such a decree and a general average adjustment relate to different subjects, and the amount paid under the decree is properly to be taken into account in general average, because the adjustment is to ascertain the contribution which must be made towards losses. The divided proceeds of the ship diminish the losses, and must be taken into account, as they would have been if they had not been paid out, but were in the registry of the court awaiting payment. It is objected that the cargo owners who did not appear in the limited liability proceedings receive the same benefit from the proceeds of the ship as those who proved their claims. That is true, and rightfully true, because the office of the adjustment is the equalization of losses, and to this end the claimants and non-claimants, in the limited liability proceedings, must stand upon the same footing. If the theory of the appellant had been adopted, a non-damaged cargo owner who received nothing from the proceeds of the ship would pay more than his share of the average loss, because the dividend which was received by the actual sufferers would have been disregarded. The contention that the ship is to contribute is valueless, because the ship contributed when its full value was paid to the claimants, ceased to be a party in interest, and, as tersely put by the counsel for the appellees, "there is no longer any ship to contribute."

In the adjustment, the mining company was charged with its share of the salvage expenses which occurred after its bullion had been sent to Aspinwall. Its whole general average contribution amounted to \$12,220.61, and so much of it as arose from the salvage expenses is especially objected to by the mining company. The question, which is one of practical importance, is, when shall the portion of cargo which is permanently detached from the vessel, and permanently separated from the rest of the cargo, and no longer having benefit from the expenses subsequent to its separation, cease to contribute towards such expenses? The

leading case in this country upon this general subject is *McAndrews v. Thatcher*, 3 Wall. 347. Its decision turned upon a state of facts not analogous to those in this case, but the elaborate discussion of the subject by Mr. Justice CLIFFORD makes the opinion one of marked value. The facts in the case were as follows: The master of a ship stranded near her port of destination, and the agent of the underwriters upon her cargo made proper efforts to get her off. Being unsuccessful, they discharged all the cargo, except an undiscovered portion, sent it to the ship's agents, who delivered it to the consignees upon average bonds. The underwriters of the vessel then sent their agent, who undertook to save the vessel. The master and crew left the ship. After an expenditure of money exceeding the value of the ship and of six weeks' time, she was floated. Upon a suit of the ship owners against the consignees of the cargo for contribution for the salvage expenses, it was held that the cargo saved before the master left should not contribute to subsequent expenses for the benefit of the ship, and that the community of interest between ship and cargo had ceased. The general principle which was sanctioned by the learned judge was that "the liability to general average continues until the property has been completely separated from the rest of the cargo, and from the whole adventure, so as to leave no community of interest remaining;" but it is admitted that, in practice, close questions will arise as to the completeness of the separation, and whether, after the alleged separation, community of interest still remains.

In attempting to ascertain whether the facts in this case show a sufficient, or only a technical, separation of the bullion from the ship and remaining cargo, it is important to notice the facts which the minds of judges in other courts have regarded as controlling upon the same question. In *Nelson v. Belmont*, 21 N. Y. 36, the other modern leading case in this country, a vessel on a voyage from New

Orleans to Havre, and having a quantity of specie on board, caught on fire in the Gulf Stream and was towed or accompanied by another vessel to Charleston. The specie was put on board this vessel, but was subsequently taken back by the master and deposited in a bank. The burning vessel was so much injured that she sank after she reached the wharf, and expenses were incurred to enable her to prosecute the voyage. General average contribution was claimed by the master from the owner of the specie. The court of appeals of New York held that the specie was liable upon the ground that the property was all the time under the control of the master and liable to be taken on board again for the purpose of being carried to its port of destination, and, those two facts existing, a community of interest remained which bound the specie to the ship. In *Insurance Co. v. Parker*, 2 Pick. (Mass.) 1, the owners of a cargo on board a vessel which was stranded within a few miles of her port of destination saved part of the cargo. Afterwards the insurers of the ship contracted to pay a specified sum to a wrecker if he saved the vessel. He brought her to the wharf with one hundred and fifty-five tons of cargo on board. It was held that this portion was liable to contribute in general average, but that the cargo which was taken from the vessel by the owners before the contract of salvage was made was not liable. In *Bevan v. Bank*, 4 Whart. (Pa.) 301, specie in a ship stranded in Delaware Bay was landed and sent to Philadelphia, the port of destination, by land, and was delivered to the owners. Eight weeks afterwards the vessel reached Philadelphia with the rest of the cargo. The supreme court of Pennsylvania held that the owners of the specie were liable to contribute in general average towards the expenses which were incurred after the specie was landed.

The tendency of the English decisions is against what the judges regard as a tendency of the courts of this country in favor of a constructive community of interest between

ship and cargo, and, on the contrary, is in favor of a strict adherence to the idea that contribution should cease when common danger has ceased; and they regard danger to the cargo as having ceased when it has been taken ashore to a place of safety: *Job v. Langton*, 6 El. & Bl. 779; *Royal Mail Steam Packet Co. v. English Bank of Rio Janeiro*, 19 Q. B. Div. 362; *Walthew v. Mavrojani*, 5 L. R. Exch. 116. In the *Steam Packet Co. Case*, which was one of specie sent ashore, and subsequently sent to the port of destination in another vessel, but by agreement of the parties, as if in the same vessel, GRANTHAM, J., summarizes his idea of the English decisions as follows:

“If the cargo sought to be made liable for general average contribution has been, at the time of the loss and expenditure, removed to a place of safety, and is not subject to the particular peril which causes the special loss and expenditure, then such cargo is not liable to general average contribution in respect to such charges.”

The decision in *Moran v. Jones*, 7 El. & Bl. 523, which was made by Lord CAMPBELL, who also decided *Job v. Langton*, is not in accordance with the strictness of the rule as stated *supra*, but harmonizes with *Nelson v. Belmont*. A vessel having stranded near Liverpool, the cargo was taken there in a lighter and warehoused. Subsequently the vessel took the cargo on board and went upon her voyage. Lord CAMPBELL held that the cargo should contribute towards the expenses subsequent to the stranding, upon the ground that the act of putting the goods on board the lighter was one part of a continuous operation of saving vessel and cargo, and that the goods continuously remained in the master's custody and control.

In this case the court evidently supposed that the transaction was about the same as if the goods had been temporarily stored in a lighter near the ship, and that there was no actual separation. It is therefore necessary, without relying upon the English decisions, which declare that they

are more strict than those of the courts of the United States, to see whether the separation of bullion and ship had so completely taken place that neither was longer bound to the other, mindful that the dictum of Justice CLIFFORD recognized that cargo, though actually separated from the ship, may still be constructively within it. The sixteen bars of bullion were, after the vessel was flooded, and before the salvage services commenced, sent to Aspinwall with other treasure, the passengers and the mails, and were forthwith sent by the steamship company in another vessel to New York, where they were delivered to the consignees. They were no longer in the custody or control of the master of the "City of Para" and were no longer constructively on board that vessel, but the adventure, as to them, was at an end, and the separation was permanent. The learned district judge was of opinion that the jettison, the flooding and the salvage services were a continued series of operations for the preservation of all the interests, and that no separation of interest can be construed to have existed; but the question is whether continuity, so far as the bullion was concerned, was not broken. The bullion was not sent to Aspinwall to save the ship, or in the process of saving the cargo. It was sent for the same reason that the mails were sent there, in order that the most compact and valuable things on board might be immediately placed beyond injury, and beyond the care and anxiety of the master, and they were intentionally sent where he could not control or be responsible for them.

The case is not one of the removal of cargo from a wrecked ship by instalments, where each removal is for the benefit of all the interests. In such a case, the first instalment is not relieved from its share of the subsequent expenses because the relations of the owners of the cargo to each other and to the ship have not been changed. In this case, the two facts of intentional and permanent separation from the ship, and a separation not for the safety of the ship or

of the rest of the cargo, show that, as to the bullion, there was no continuity of operations, and that the relations of the owner to the rest of the cargo and to the ship had been changed. These facts also make it immaterial who received the bullion at Aspinwall, and sent it to New York. A different state of facts might make the action of the owner of the vessel, in rescuing a valuable part of the cargo, and sending it forward to its destination, of importance; but in this case it is not material whether the steamship company or the owner of the bullion received it at Aspinwall. We are of opinion that the decree should be so modified that the specie or the bullion of the mining company should not contribute to the cost of salvage operations after May 25.

The California Vintage Company, an owner of cargo, also, on board the "City of Para," is the other appellant from a decree of the district court against it, upon a similar average bond. The two causes, together with others, were tried in the district court at the same time, and upon the same record. The cargo owned by the vintage company consisted of 225 barrels of wine, which were damaged to the amount of \$88.07. The barrels remained in the ship, and were brought by her to New York. The amount to be contributed by the appellant in general average was found by the district court to be \$294.26, with interest and costs. The points which are presented upon this appeal are the same as those in the mining company case, except the one arising from the separation of the bullion from the steamer before salvage operations commenced.

The decree of the district court in the case against the mining company is reversed, with costs of this court, and is remanded to that court, with instructions to enter a decree, with costs against the appellant, in accordance with the foregoing opinion. The decree of the district court in the vintage company case is affirmed, with interest and costs of this court.

CONTRIBUTION.

I. IN GENERAL.

1. General Principle.—Whenever one of several persons who are jointly interested in a transaction makes a payment which any of the others might have been compelled to make, and which enures to the benefit of all, he is entitled to contribution from his fellows, if he pays more than his proportionate share of the total expenditure necessary. This rule is founded upon the broad principle of equity, that when the interest is common, the burden must also be common. Accordingly, when one of several parties who are jointly bound for a common debt is compelled to pay more than his proportionate share of that debt, he is entitled to contribution from his fellow-debtors: *Stirling v. Forrester*, 3 Bligh, 575; *White v. Banks*, 21 Ala. 705; *Wood v. Leland*, 1 Metc. (Mass.) 387; *Evans v. Clapp*, 123 Mass. 165; *Van Petten v. Richardson*, 68 Mo. 379; *Campbell v. Mesier*, 4 Johns. Ch. (N. Y.) 334; *Campbell v. Mesier*, 6 Johns. Ch. (N. Y.) 21; *Aspinwall v. Sacchi*, 57 N. Y. 331; *Wells v. Miller*, 66 N. Y. 255; *Allen v. Wood*, 3 Ired. Eq. (N. C.) 386; *Russell v. Failor*, 1 Ohio St. 327; *Oldham v. Broom*, 28 Ohio St. 41; *Mills v. Hyde*, 19 Vt. 59; *Foster v. Burton*, 62 Vt. 329; see *infra*, §§ 4–29; when one joint owner of property pays an encumbrance thereon, or makes a necessary expenditure for the common benefit, he is entitled to call upon his co-owners to share the burden with him: *Leigh v. Dickeson*, 12 Q. B. D. 194; *Young v. Williams*, 17 Conn. 393; *Gosselin v. Smith*, 154 Ill. 74; *Mumford v. Brown*, 6 Cow. (N. Y.) 475; *Dech's Appeal*, 57 Pa. 467; *Ward v. Ward*, (W. Va.) 21 S. E. Rep. 746; see *infra*, §§ 30–40; when one person is compelled to pay damages for the wrong of another, if he is not himself guilty of any moral wrong or turpitude, the other must either contribute, or indemnify him, according to circumstances: see *infra*, §§ 41–48; and when a loss which might fall upon any one of several parties with common interests is made to fall upon one alone, the latter may have contribution from the others: *Godin v. London Assur. Co.*, 1 Burr. 492; *Wilson v. Cross*, 33 Cal. 60; *Clowes v. Dickenson*, 5 Johns. Ch. (N. Y.) 235; *Lucas v. Jeffer-*

son Ins. Co., 6 Cow. (N. Y.) 635; Glass v. Dunn, 17 Ohio St. 413; Stacey v. Franklin Fire Ins. Co., 2 W. & S. (Pa.) 506; Merrick v. Germania Fire Ins. Co., 54 Pa. 277; see *infra*, §§ 49-66.

2. General Rules.—In general, there is no right to contribution until the debt is paid, or the expenditure made: Taylor v. Means, 73 Ala. 468; Smith v. State, 46 Md. 617; Phillips v. Blatchford, 137 Mass. 510; Van Petten v. Richardson, 68 Mo. 379; Morgan v. Smith, 70 N. Y. 537; see Robinson v. Harkin, [1896] 2 Ch. 415; and see *infra*, § 9; and the statute of limitations runs against the claim for contribution from that time, and not from the date of the original obligation: Davies v. Humphreys, 6 M. & W. 153; Wolmershausen v. Gullick, [1893] 2 Ch. 514; Pass v. Grenada Co., 71 Miss. 426; Sherrod v. Woodard, 4 Dev. (N. C.) 360; see *infra*, § 22; and therefore the one who pays the debt may recover contribution from his co-sureties, though the creditor is barred from recovering his debt from them: Camp v. Bostwick, 20 Ohio St. 337; see *infra*, § 22; *e. g.*, when one of several co-principals has made payments on a note so as to toll the statute, and being consequently liable to pay the whole note, does pay it, he may recover contribution from the others, though the statute has run between them and the creditor: Gardner v. Brooke, [1897] 2 I. R. 6. The payment must be compulsory, however; a voluntary payment will not entitle to contribution: Bradley v. Burwell, 3 Denio, (N. Y.) 61; Webster's Appeal, 86 Pa. 409; Aldrich v. Aldrich, 56 Vt. 324; Watson v. Wilcox, 39 Wis. 643; see *infra*, § 10; but the payment of a debt barred by the statute of limitations is voluntary: Turner v. Thom, 89 Va. 745. The rule extends to the voluntary payment of contribution above one's proportionate share. Such a payment will give no right to share in the contribution recovered from others: Gay v. Ward, 67 Conn. 147. The estate of a decedent will be liable to contribute: Conover v. Hill, 76 Ill. 342; Stothoff v. Dunham, 19 N. J. L. 181; Johnson v. Harvey, 84 N. Y. 363; Jones v. McKinnon, 87 N. C. 294; Glasscock v. Hamilton, 62 Tex. 143; see *infra*, § 8; but the claim is a personal one, and must be made upon the personal representative, not the heirs: Wetmore v. Dobbins, 38

W. N. C. (Pa.) 540. The liability to contribute is several, and will not authorize a joint judgment against all those who are liable : *Graves v. Smith*, 4 Tex. Civ. App. 537 ; see *Murphy v. Gage*, (Tex.) 21 S. W. Rep. 396. If any of those who would otherwise be liable are insolvent, or out of the jurisdiction, the basis of contribution is to be determined by the number of the contributors who are solvent, or within the jurisdiction : *Dallas v. Walls*, 29 L. T. N. S. 599 ; *Kennedy v. Gibson*, 8 Wall. 498 ; *Cummings v. May*, 91 Ala. 233 ; *North v. Brace*, 30 Conn. 60 ; *Whitman v. Porter*, 107 Mass. 522 ; *Stewart v. Goulden*, 52 Mich. 143 ; *Smith v. Mason*, 44 Neb. 610 ; *Boardman v. Paige*, 11 N. H. 431 ; *Gross v. Davis*, 87 Tenn. 226 ; see *infra*, § 8 ; but the mere refusal of one to pay will not authorize an increase in the share recovered from each of the others : *Faires v. Cock-erill*, (Tex.) 29 S. W. Rep. 669. The claim for contribution may be enforced by a suit in equity, or at law : *Werborn v. Kahn*, 93 Ala. 201 ; *Wells v. Miller*, 66 N. Y. 255 ; *Bright v. Lennon*, 83 N. C. 183 ; see *infra*, § 4 ; and in equity, may be settled in the suit in which the decree creating the joint liability is rendered : *Hickey v. Dole*, 66 N. H. 612. The right to contribution may be lost by laches : *Johnson v. Peck*, 58 Ark. 580 ; *Compton v. Thorn*, 90 Va. 653 ; but an agreement to hold one harmless will not release the others from their liability to contribute : *Murphy v. Gage*, (Tex.) 21 S. W. Rep. 396.

3. In whose Favor Contribution will be Enforced.—Contribution will be enforced between joint obligors and co-sureties : *Dering v. Winchelsea*, 1 Cox Ch. 318 ; *Wolmershausen v. Gullick*, [1893] 2 Ch. 514 ; *Moore v. Baker*, 34 Fed. Rep. 1 ; *Chipman v. Morrill*, 20 Cal. 130 ; *Baldwin v. Fleming*, 90 Ind. 177 ; *Hichborn v. Fletcher*, 66 Me. 209 ; *Wilkerson v. Sampson*, 56 Mo. App. 276 ; *Neilson v. Williams*, 42 N. J. Eq. 291 ; *Hawker v. Moore*, 40 W. Va. 49 ; see *infra*, §§ 4–27 ; co-guarantors : *Gay v. Ward*, 67 Conn. 147 ; *Hooper v. Hooper*, 81 Md. 155 ; joint mortgagors : *Roehl v. Porteous*, 47 La. An. 1582 ; *Coffin v. Leech*, 12 Misc. Rep. (N. Y.) 593 ; joint judgment debtors : *Clarke v. Austin*, 96 Cal. 283 ; *Bagley v. Pettibone*, 20 N. Y. Suppl. 305 ; insurers upon the same interest : see *infra*, § 28 ; the members of an unincorporated association : *Hodgson*

v. Baldwin, 65 Ill. 532; tenants in common: *Wilton v. Tazwell*, 86 Ill. 29; *Van Brunt v. Gordon*, 53 Minn. 227; *Wilmot v. Lathrop*, 67 Vt. 671; see *infra*, § 31; partners: *Sears v. Starbird*, 78 Cal. 225; *Converse v. Hobbs*, 64 N. H. 42; *Preston v. Fitch*, 137 N. Y. 41; see *infra*, §§ 35–39; stockholders of a corporation: *Allen v. Fairbanks*, 45 Fed. Rep. 445; *Redington v. Cornwell*, 90 Cal. 49; *Hadley v. Russell*, 40 N. H. 109; *Aspinwall v. Sacchi*, 57 N. Y. 331; see *infra*, § 40; and its directors: *Ramskill v. Edwards*, 31 Ch. D. 100; *Nickerson v. Wheeler*, 118 Mass. 295; see *infra*, § 48. So, an agreement by several parties to equally aid, comfort and take care of a third party, when sick, may sustain a decree in equity for contribution: *Odiorne v. Moulton*, 64 N. H. 211; and when devisees are made jointly liable for the support of the testator's family, or members thereof, one who bears all the burden may call upon the others to contribute: *Shillito v. Shillito*, 160 Pa. 167. But there is no contribution between joint tort-feasors: *Merryweather v. Nixan*, 8 T. R. 186; *Nichols v. Nowling*, 82 Ind. 488; *Churchill v. Holt*, 131 Mass. 67; *Atkins v. Johnson*, 43 Vt. 78; see *infra*, § 41; or co-trustees guilty of a breach of trust: see *Butler v. Butler*, 7 Ch. D. 116; *Bahin v. Hughes*, 31 Ch. D. 390; see *infra*, § 46; except under special circumstances—*e. g.*, when the party seeking contribution has not been guilty of a wilful wrong: *Wooley v. Batte*, 2 C. & P. 417; *Bailey v. Bussing*, 28 Conn. 455; *Sherner v. Spear*, 92 N. C. 148; *Horbach v. Elder*, 18 Pa. 33; see *infra*, §§ 42–45, 46, 47.

II. CONTRIBUTION BETWEEN JOINT OBLIGORS.

4 Contribution between Co-sureties—Enforceable in Equity or at Law.—Whenever several persons are bound as sureties for the same obligation, and one of them, on default of the principal, is compelled to pay more than his proper proportion of the entire liability, he has a right to call upon his co-sureties to contribute to him a ratable proportion of the excess he has paid over and above his due share. This was originally a purely equitable right, based not upon any contract between the sureties, but on the broad principle stated above, that a community of interest or of benefit should carry with it a community of burden: *Layer v. Nelson*, 1 Vern. 455; *Dering v.*

Winchelsea, 1 Cox Ch. 318; Stirling v. Forrester, 3 Bligh, 575; Woods v. Creaghe, 2 Hog. 50; Reynolds v. Wheeler, 10 C. B. N. S. 561; Whiting v. Burke, 6 L. R. Ch. 342, affirming 10 L. R. Eq. 539; Margrett v. Gregory, 6 L. T. N. S. 543; *In re* Swan, 4 Ir. R. Eq. 209; McDonald v. Magruder, 3 Pet. 470; Pinkston v. Taliaferro, 9 Ala. 547; White v. Banks, 21 Ala. 705; Anthony v. Percifull, 8 Ark. 494; Harvey v. Drew, 82 Ill. 606; Crowdus v. Shelby, 6 J. J. Marsh. (Ky.) 61; Stubbins v. Mitchell, 82 Ky. 535; Norton v. Soule, 2 Me. 341; Yates v. Donaldson, 5 Md. 389; Newcomb v. Gibson, 127 Mass. 396; Van Petten v. Richardson, 68 Mo. 379; Wyckoff v. Gardner, (N. J.) 5 Atl. Rep. 801; Wells v. Miller, 66 N. Y. 255; Allen v. Wood, 3 Ired. Eq. (N. C.) 386; Russell v. Faylor, 1 Ohio St. 327; Oldham v. Broom, 28 Ohio St. 41; Mills v. Hyde, 19 Vt. 59. Being thus a purely equitable remedy, contribution was originally only enforceable in equity; but the reason and justice of the rule were so evident that courts of law soon adopted and administered it, on the ground of an implied assumpsit, arising from the fact that the doctrine had become so well established in equity that parties were presumed to enter into contracts of suretyship with full knowledge of their liability, and hence impliedly undertook to contribute their due proportions to the common loss: Chipman v. Morrill, 20 Cal. 130; Lansdale v. Cox, 7 T. B. Mon. (Ky.) 403; Robertson v. Maxcey, 6 Dana, (Ky.) 101; Powers v. Nash, 37 Me. 322; Hichborn v. Fletcher, 66 Me. 209; Carroll v. Bowie, 7 Gill, (Md.) 34; Bachelder v. Fisk, 17 Mass. 464; Mason v. Lord, 20 Pick. (Mass.) 447; Jeffries v. Ferguson, 87 Mo. 244; Wilkerson v. Sampson, 56 Mo. App. 276; Fletcher v. Grover, 11 N. H. 368; Norton v. Coons, 3 Denio, (N. Y.) 130; Wilder v. Butterfield, 50 How. Pr. (N. Y.) 385; Rindge v. Baker, 57 N. Y. 209; Richards v. Simms, 1 Dev. & Bat. (N. C.) 48. This, however, did not oust the jurisdiction of equity; for in equity only can full justice be done to all the rights of the parties interested. The equitable remedy is, therefore, still available at the option of the party seeking contribution, and in fact is the one most frequently chosen. But in courts with combined law and equity powers, as in most of the United States, the selection of the form is a question of little practical importance: Cowell v. Edwards, 2 Bos. & P. 268; Wright v.

Hunter 5 Ves. 792; Lidderdale v. Robinson, 12 Wheat. 594, affirming 2 Brock. (U. S.) 159; Moore v. Baker, 34 Fed. Rep. 1; Couch v. Terry, 12 Ala. 225; Evans v. Evans, 16 Ala. 465; Broughton v. Wimberly, 65 Ala. 549; Werborn v. Kahn, 93 Ala. 201; Deakyne v. Buchanan, 3 Houst. (Del.) 124; Hayden v. Thrasher, 28 Fla. 162; Freeman v. Cherry, 46 Ga. 14; Conover v. Hill, 76 Ill. 342; Thebus v. Smiley, 110 Ill. 316; Baldwin v. Fleming, 90 Ind. 177; Mitchell v. Sproul, 5 J. J. Marsh. (Ky.) 264; Crowds v. Shelby, 6 J. J. Marsh. (Ky.) 61; Lee v. Forman, 3 Metc. (Ky.) 114; January v. January, 7 T. B. Mon. (Ky.) 543; Whitman v. Gaddie, 7 B. Mon. (Ky.) 591; Stockmeyer v. Oertling, 38 La. An. 100; Waters v. Riley, 2 Har. & G. (Md.) 305; Johnson v. Johnson, 11 Mass. 359; Chaffee v. Jones, 19 Pick. (Mass.) 260; Ryneerson v. Turner, 52 Mich. 7; Felton v. Bissel, 25 Minn. 15; Barge v. Van Der Horck, 57 Minn. 497; McCourtney v. Sloan, 15 Mo. 95; Labeaume v. Sweeney, 17 Mo. 153; Frost v. Tracy, 52 Mo. App. 308; Black v. Shreeve, 7 N. J. Eq. 440; Paulin v. Kaighn, 29 N. J. L. 480; Neilson v. Williams, 42 N. J. Eq. 291; Bk. of Poughkeepsie v. Ibbotson, 24 Wend. (N. Y.) 479; Yorks v. Peck, 14 Barb. (N. Y.) 644; Green v. Millbank, 56 How. Pr. (N. Y.) 382; Wells v. Miller, 66 N. Y. 255; Pfohl v. Simpson, 74 N. Y. 137; Carrington v. Carson, Cam. & N. (N. C.) 216, 624; Daniel v. McRae, 2 Hawks, (N. C.) 590; Richards v. Simms, 1 Dev. & Bat. L. (N. C.) 48; Bright v. Lennon, 83 N. C. 183; Douglas v. Waddle, 1 Ohio, 413; Bain v. Wilson, 10 Ohio St. 14; Neilson v. Fry, 16 Ohio St. 552; Wilson v. Stewart, 24 Ohio St. 504; Craig v. Craig, 5 Rawle, (Pa.) 91; Cooper's Estate, 4 Pa. Super. Ct. 615; Aikin v. Peay, 5 Strobb. L. (S. Car.) 15; McClelland v. Davis, 4 Lea, (Tenn.) 97; Jackson v. Murray, 77 Tex. 644; Stout v. Vause, 1 Rob. (Va.) 169; Wayland v. Tucker, 4 Gratt. (Va.) 267; Hawker v. Moore, 40 W. Va. 49; Hardell v. Carroll, 90 Wis. 350.

5. Contribution only in Case of Joint Liability.—The right of contribution only exists when the liability of the sureties to the creditor is joint. If they are jointly and severally liable, there is no such right: Mayor of Berwick v. Murray, 7 De G., M. & G. 497; and in such a case the release of one will discharge all: Evans v. Bremridge, 2 Kay & J. 174. So if, by the

terms of the contract, it is provided that each surety shall only be liable for a certain sum, he cannot claim contribution from the others : *Pendlebury v. Walker*, 4 Y. & Coll. 424 ; *Paul v. Berry*, 78 Ill. 158 ; *Bagott v. Mullen*, 32 Ind. 332 ; *Harris v. Warner*, 13 Wend. (N. Y.) 400 ; *Barry v. Ransom*, 12 N. Y. 462 ; *Moore v. Isley*, 2 Dev. & Bat. Eq. (N. C.) 372 ; and if they have agreed together to raise a common fund, some contributing more and others less than their due proportion, and have also agreed to release the latter from all further liability, the payment and release operates as payment in full of their shares, and there is no liability to contribute : *Cummings v. May*, 91 Ala. 233. Further, in order to entitle the one who pays the debt to contribution, he must stand in the same relation to the principal as that which exists between the latter and those from whom the contribution is sought : *Wells v. Miller*, 66 N. Y. 255 ; and, accordingly, the surety of a surety is not entitled to demand contribution from the co-sureties of his principal, and they cannot have contribution from him ; there is no privity between them : *Bulkeley v. House*, 67 Conn. 459 ; *Robertson v. Deatherage*, 82 Ill. 511 ; *Knox v. Vallandigham*, 13 S. & M. (Miss.) 526 ; *Price v. Edwards*, 11 Mo. 524 ; *Adams v. Flanagan*, 36 Vt. 400. So, there is no right to contribution between an indorser and a surety on a note : *Armstrong v. Harshman*, 61 Ind. 52 ; or between a guarantor and a surety : *Longley v. Griggs*, 10 Pick. (Mass.) 121 ; *Montgomery v. Page*, 29 Oreg. 320 ; *supra*, p. 87 ; though they may make themselves jointly liable by agreement. But the sureties need not necessarily be bound for the same principal. It is sufficient if they be bound for the same undertaking and be subject to the same liability. For instance, sureties on separate bonds of joint guardians and joint trustees, any one of whom is obliged to pay a debt for which all the principals are liable, should certainly recover contribution from all the rest ; and if it be a debt or liability for which his immediate principal is not primarily liable, as in case of a tort, (see *infra*, §§ 42, 43,) he ought to recover indemnity. Accordingly, it has been held that the sureties on the bond of a deputy sheriff are liable to the sureties on the bond of the sheriff for money paid by them, on failure of the deputy to pay it : *Brinson v. Thomas*, 2 Jones Eq. (N. C.) 414. A joint lia-

bility may be proved by parol: *Paul v. Berry*, '78 Ill. 158; *Blake v. Cole*, 22 Pick. (Mass.) 97; *Barry v. Ransom*, 12 N. Y. 462.

6. Contribution between Sureties upon Different Instruments.—It is not necessary, in order to found a right to contribution, that the sureties should be bound by the same instrument. It is enough that they be bound for the same principal and the same undertaking, though by different instruments and at different times: *Dering v. Winchelsea*, 1 Cox Ch. 318; *Breckinridge v. Taylor*, 5 Dana, (Ky.) 110; *Craig v. Ankeney*, 4 Gill, (Md.) 225; *Chaffee v. Jones*, 19 Pick. (Mass.) 260; *Young v. Shunk*, 30 Minn. 503; *Armitage v. Pulver*, 37 N. Y. 494; *Aspinwall v. Sacchi*, 57 N. Y. 331; *Butler v. Birkey*, 13 Ohio St. 514; *Harris v. Ferguson*, 2 Bailey, (S. Car.) 397. In *Whiting v. Burke*, 6 L. R. Ch. 342, affirming 10 L. R. Eq. 539, a bond executed by a principal and two sureties provided that the sureties should not be discharged by any new arrangement between the creditor and the principal, and that if either of the obligors should be declared a bankrupt, or make a composition with his creditors, the moneys secured by the bond should at once become due and payable. One of the sureties having compounded with his creditors, and the bond having, therefore, become payable by its terms, the plaintiff in this action entered into a separate undertaking to become liable for the whole amount, and upon the principal becoming insolvent, the creditor sued the plaintiff and obtained payment of the amount due. The plaintiff then filed his bill against the solvent surety in the first bond for contribution, and it was held that he was entitled to the relief sought. So, if there are several sureties on an official bond, and during its life another bond is given in the same form as the previous one for the general conduct of the principal, all the sureties in both bonds are liable to contribution among each other; and the same would probably be true when, on an increase of bail, an additional bond is given for the increase, instead of a new bond for the whole amount: *Bosley v. Taylor*, 5 Dana, (Ky.) 157; *Bell v. Jasper*, 2 Ired. Eq. (N. C.) 597; *McKenna v. George*, 2 Rich. Eq. (S. Car.) 15. Thus, the sureties on successive guardian's bonds,

(and *eadem ratione* those on successive trustee's bonds,) though differing in personnel and bound for differing penalties, are liable to contribute to a breach of any of them: *Bell v. Jasper*, 2 Ired. Eq. (N. C.) 597; *Jones v. Hays*, 3 Ired. Eq. (N. C.) 502; *Jones v. Blanton*, 6 Ired. Eq. (N. C.) 115; *Bright v. Lennon*, 83 N. C. 183; unless the new bond is given on the application of the sureties on the former one; for they cannot thus take advantage of their own action to relieve themselves even partially from their liability: *Cross v. Scarboro*, 6 Baxt. (Tenn.) 134. The sureties on a new bond, given in accordance with the terms of a former one, on the death of one surety therein, with an express provision that the estate of the deceased surety shall not be released, can compel contribution from that estate: *Coles v. Peyton*, [1893] 3 Ch. 238. The sureties on a bond to enjoin an execution are co-sureties with the sureties on a *superseas* bond, since the undertaking is practically the same: *Lewis v. Armstrong*, 80 Ga. 402; and for the same reason the sureties on a sheriff's official bond and those on his bond as tax collector are equally liable to contribute to the payment of judgments recovered for his default in not paying over taxes collected: *Burnett v. Millsaps*, 59 Miss. 333. Further, though the liability of the sureties is several and for different amounts, yet if the total of those amounts is equal to the sum in which the principal is bound, the right of contribution will arise: *Breckinridge v. Taylor*, 5 Dana, (Ky.) 110; *Toucey v. Schell*, 15 Misc. Rep. (N. Y.) 350; *contra*, *Craythorne v. Swinburne*, 14 Ves. 160.

7. Contribution in Case of Sureties for Different Undertakings.—When the undertakings of the sureties are different, as, for instance, when they are bound by different instruments, though for different portions of the same debt, and the suretyship of each is a separate and distinct transaction, there is no right of contribution between them: *Coope v. Twynam*, T. & R. 426; accordingly, when a note, executed by principal and surety, is taken up by two new notes, one signed by the same parties, and the other by a new surety, and the original surety is obliged to pay the new note on which he became surety, he has no right of contribution against the surety on the other note: *Conrad v.*

Smith, (Va.) 21 S. E. Rep. 501; and when several persons are bound as sureties on separate instruments, given in separate transactions, they do not become co-sureties by being made co-obligees in a bond of indemnity given for those debts; and there is therefore no contribution between them: *Hutchison v. Roberts*, 8 Houst. (Del.) 459, affirming 6 Del. Ch. 112. No right of contribution arises between the sureties on a note and those on a new note given in discharge of the former: *Chapman v. Garber*, 46 Neb. 16; *Bell v. Boyd*, 76 Tex. 133; between the sureties on a guardian's bond and those on a note due from the guardian to the ward: *Johnson v. Hicks*, (Ky.) 30 S. W. Rep. 3; between a surety for a debt and a surety on a replevin bond for goods seized for that debt: *Yoder v. Briggs*, 3 Bibb, (Ky.) 228; *Hammock v. Baker*, 3 Bush, (Ky.) 208; between a surety for a debt and the bail for appearance or stay of execution: *Hanner v. Douglass*, 4 Jones Eq. (N. C.) 262; between sureties on a bond for the payment of money, or any other pecuniary undertaking, and those on a forthcoming bond given on execution against the principal in the original undertaking: *Dunlop v. Foster*, 7 Ala. 734; *Langford v. Perrin*, 5 Leigh, (Va.) 552; between sureties on a replevin bond and those on a *supersedeas* or appeal bond: *Kellar v. Williams*, 10 Bush, (Ky.) 216; *Rosenbaum v. Goodman*, 78 Va. 121; and between those on a bond for the dissolution of an attachment and those on a *supersedeas* bond: *Hartwell v. Smith*, 15 Ohio St. 200. In *Boone Co. v. Jones*, 58 Iowa, 373, a county treasurer, holding over, gave a bond for the full term. He was subsequently re-elected and then gave a new bond for the unexpired term. This last was held to be an original undertaking, and the sureties on it not co-sureties with those on the other. So, in *Schram v. Werner*, 85 Hun, (N. Y.) 293, the plaintiff gave to a bank a guaranty of all debts to it incurred by one E. to a certain amount, his liability thereon to continue until terminated by notice. While this guaranty was in force, the defendants accepted a draft for the accommodation of E., with the understanding that the draft should be discounted at the bank, and that the defendants should be protected by the plaintiff's guaranty. The plaintiff did not know of the acceptance of the draft until the bank sued him on his guaranty. He then

sued the defendants for contribution; but it was held that the plaintiff and the defendants were successive sureties, and that he could not recover.

8. Contribution from Insolvent or Deceased Sureties.— Whenever the sureties have once become liable to contribute that liability continues, without regard to their pecuniary situation, or other circumstances, until they are released. Thus, a claim for contribution may be made against the estate of a bankrupt or insolvent co-surety, even though its amount is not ascertainable at the time of the bankruptcy or insolvency: *Wolmershausen v. Gullick*, [1893] 2 Ch. 514; and the claimant may sue for the whole of the debt, though he can recover only the proper proportion of it: *In re Parker*, [1894] 3 Ch. 400. The estate of a deceased surety is also liable to contribute: *Ralston v. Wood*, 15 Ill. 159; *Conover v. Hill*, 76 Ill. 342; *Bachelder v. Fisk*, 17 Mass. 464; *Sibley v. McAllaster*, 8 N. H. 389; *Stothoff v. Dunham*, 19 N. J. L. 181; *Bradley v. Burwell*, 3 Denio, (N. Y.) 61; *Johnson v. Harvey*, 84 N. Y. 363; *Howell v. Reams*, 73 N. C. 391; *Jones v. McKinnon*, 87 N. C. 294; *Malin v. Bull*, 13 S. & R. (Pa.) 441; *Burrows v. M'Whann*, 1 Desaus. Ch. (S. Car.) 409; *McKenna v. George*, 2 Rich. Eq. (S. Car.) 15; *Reeves v. Pulliam*, 7 Baxt. (Tenn.) 119; *Glasscock v. Hamilton*, 62 Tex. 143; and a voluntary conveyance by the decedent may be set aside at the suit of the surety seeking contribution: *Shurts v. Howell*, 30 N. J. Eq. 418. The claim for contribution in such a case should be made upon the personal representative, however, not the heir, for the latter is not personally liable for it: *Wetmore v. Dobbins*, 38 W. N. C. (Pa.) 540; though if the liability of the decedent to contribute is not ascertained until his estate has been finally settled, an heir who has received assets from that estate may be compelled to pay the contribution due from his ancestor to the extent of those assets; if he has received no personalty, or if that is insufficient, then out of the realty: *Hecht v. Skaggs*, 53 Ark. 291; *Stevens v. Tucker*, 87 Ind. 109; *Stephens v. Meek*, 6 Lea, (Tenn.) 226. In equity, he should of course have contribution from his co-heirs. But where a statute requires all claims against the estate of a decedent to be presented within a certain time, a

claim for contribution, not so presented, is barred: *Ernst v. Nau*, 63 Wis. 134. *Per contra*, the executor of a deceased surety, who is compelled to pay the debt from the estate of his decedent, may obtain contribution from the other sureties: *Dussol v. Bruguere*, 50 Cal. 456.

9. No Contribution before Payment of More than Just Share of Debt.—There is no right of contribution until the surety has paid more than his just proportion of the debt. If he pays less than that amount, he cannot ask his co-sureties to bear a part of his burden, for they may have to pay the whole of the balance in the future, and will then have a right to contribution from him: *Cowell v. Edwards*, 2 Bos. & P. 268; *Davies v. Humphreys*, 6 M. & W. 153; *Rutherford v. Branch Bank*, 14 Ala. 92; *Taylor v. Means*, 73 Ala. 468; *City of Keokuk v. Love*, 31 Iowa, 119; *Lytle v. Pope*, 11 B. Mon. (Ky.) 309; *Smith v. State*, 46 Md. 617; *Nally v. Long*, 56 Md. 567; *Wood v. Leland*, 1 Metc. (Mass.) 387; *Backus v. Coyne*, 45 Mich. 584; *Van Petten v. Richardson*, 68 Mo. 379; *People v. Duncan*, 1 Johns. (N. Y.) 311; *Morgan v. Smith*, 70 N. Y. 537; accordingly, a payment of half the debt by one of two sureties gives no right to contribution, unless that payment is accepted in satisfaction of the whole: *Pegram v. Riley*, 88 Ala. 399; *Martin v. Frantz*, 127 Pa. 389. This rule holds good, though the amount paid is more than would have been the due share of the surety paying, if all the sureties were solvent, but less than his existing liability, by reason of the insolvency of some of them: *Magruder v. Admire*, 4 Mo. App. 133; or more than he would have paid, had he been sued for his share alone; *e. g.*, in case of insolvency: *Apperson v. Wilbourn*, 58 Miss. 439; and though the co-surety is not required by the creditor to pay anything, provided he be not regularly released: *Ex parte Snowden*, 17 Ch. D. 44. As soon as he has paid more than his share of the debt under existing circumstances, however, the right of contribution arises as to that excess: *Hickman v. McCurdy*, 7 J. J. Marsh. (Ky.) 555; *Pass v. Grenada Co.*, 71 Miss. 426; *Bushnell v. Bushnell*, 77 Wis. 435; but see *Gourdin v. Trenholm*, 25 S. Car. 362; and, therefore, if the creditor gives him a receipt in full, he can recover contribution, though the amount paid is

less than his share of the real debt: *Werborn v. Kahn*, 93 Ala. 201; but, of course, only a *pro rata* share of the amount paid. A payment by a surety by giving his note to the creditor will authorize him to sue his co-surety for contribution: *Owen v. McGehee*, 61 Ala. 440; *Keller v. Boatman*, 49 Ind. 104; *White v. Carlton*, 52 Ind. 371; *Stubbins v. Mitchell*, 82 Ky. 535; *contra*, *Brisendine v. Martin*, 1 Ired. L. (N. C.) 286; *Nowland v. Martin*, 1 Ired. L. (N. C.) 307. So, in *McKee v. Campbell*, 27 Mich. 497, a surety who paid half the debt and joined the other in giving a note for the other half, and was sued thereon and paid the judgment, was allowed to recover from his co-surety the amount of the note and the costs of suit.

10. The Payment must be Compulsory.—In order to found a claim for contribution, the payment by the surety must have been compulsory. By this is meant, not that he should be actually compelled to pay it, but that it was one which he could have been legally compelled to pay: *Pitt v. Purssord*, 8 M. & W. 538; *Gay v. Ward*, 67 Conn. 147; *Dawson v. Lee*, 83 Ky. 49; *Skrainka v. Rohan*, 18 Mo. App. 340; *Bradley v. Burwell*, 3 Dênio, (N. Y.) 61; *Aldrich v. Aldrich*, 56 Vt. 324. The payment of a debt for which judgment has been recovered is compulsory, in this sense; and so is a claim which has been allowed in insolvency or probate proceedings: *Wolmershausen v. Gullick*, [1893] 2 Ch. 514. Moreover, if the debt is a valid one, due *in præsenti*, and not open to any successful defence, the surety need not wait for judgment or execution against him, or even for a suit, before paying it. Indeed, payment of such a claim without legal proceedings ought to be favored, because it lessens the ultimate liability of the co-sureties to the extent of the costs and expenses of suit. But, of course, the burden of proving the binding nature of the debt rests on the surety who seeks contribution: *Fishback v. Weaver*, 34 Ark. 569; *Harvey v. Drew*, 82 Ill. 606; *Wagenseller v. Prettyman*, 7 Ill. App. 192; *Reiter v. Cumbach*, 1 Ind. App. 41; *Bond v. Bishop*, 18 La. An. 549; *Minneapolis Mill Co. v. Wheeler*, 31 Minn. 121; *Mauri v. Heffernan*, 13 Johns. (N. Y.) 58; *Crisfield v. Murdock*, 127 N. Y. 315; *Linn v. McClelland*, 4 Dev. & Bat. L. (N. C.) 458; *Briggs v. Hinton*, 14 Lea, (Tenn.) 233; *Mason v. Pierron*, 69 Wis. 585. If, how-

ever, the surety could not have been compelled to pay the debt, his payment of it is voluntary, and he cannot call on his co-sureties to contribute. Accordingly, the voluntary payment of money on a void note: *Russell v. Faylor*, 1 Ohio St. 327; or of a claim barred by the statute of limitations: *Fordham v. Wallis*, 17 Jur. 228; *Shelton v. Farmer*, 9 Bush, (Ky.) 314; *Long v. Miller*, 93 N. C. 227; *Cocke v. Hoffman*, 5 Lea, (Tenn.) 105; *Glasscock v. Hamilton*, 62 Tex. 143; or of the penal sum in a bail bond, before final judgment: *Skillin v. Merrill*, 16 Mass. 40; will not create any liability to contribute on the part of the co-sureties; and the payment of the whole debt by a few, after all had agreed to pay it together, is voluntary, and will not support a claim for contribution: *Curtis v. Parks*, 55 Cal. 106. In *Halsey v. Murray*, (Ala.) 20 So. Rep. 575, a decree was granted according to the prayer of a bill for an injunction against a levy on individual property of members of a firm under a judgment against the firm, and the injunction had provided for payment of the judgment "herein enjoined." After the affirmance of an order dissolving the writ, a surety on the injunction bond voluntarily paid the amount of the judgment. He then brought suit against his co-sureties for contribution, but it was held that he could not recover from them, because the injunction did not affect the judgment, and the bond created no liability for the payment thereof. But, on the other hand, the payment of a note to which there is a good defence, not known to the surety, is not such a voluntary payment as will defeat the right to contribution: *Hichborn v. Fletcher*, 66 Me. 209; and when a sheriff has appealed alone from a judgment against him, which is affirmed in the supreme court, the payment of the supreme court judgment by the surety on his official bond will not be voluntary; for the surety is bound by the judgment below, which the judgment of the higher court only renders effective: *Briggs v. Hinton*, 14 Lea, (Tenn.) 233. Further, it would seem that if the one who pays alone has a defence to the debt, a voluntary payment by him ought not to debar him of contribution, if he rests under any moral obligation to pay it; for such action rather benefits than injures his co-sureties. Accordingly, a voluntary payment of a debt after discharge as a bankrupt or insolvent will entitle a surety to contribution:

Craven v. Freeman, 82 N. C. 361; and on the same reasoning, if he pays it after the statute of limitations has run against him alone, (as may be the case,) he ought equally to recover from the other sureties their share of the debt. In *Aldrich v. Aldrich*, 56 Vt. 324, after the debt had been barred by the statute in one state, one of the sureties went, without any intent of incurring liability, into another state, where it was not barred, was sued there by the creditor and compelled to pay it; and he was allowed to recover contribution from his co-sureties.

11. Demand upon Principal not Requisite.—There is a decided conflict of opinion as to whether it is necessary that the surety should first exhaust his remedy against the principal before asking contribution from his co-sureties; or, in other words, whether the insolvency of the principal, or his inability to pay the debt, is a necessary element of the liability to contribution. The general rule in equity, founded upon the principles of that system, is, that the surety who seeks contribution must first show that he cannot obtain restitution or indemnity from the principal: *Pearson v. Duckham*, 3 Litt. (Ky.) 385; *Daniel v. Ballard*, 2 Dana, (Ky.) 296; *Morrison v. Poyntz*, 7 Dana, (Ky.) 307; *Poignard v. Vernon*, 1 T. B. Mon. (Ky.) 46; *Atkinson v. Stewart*, 2 B. Mon. (Ky.) 348; *Bolling v. Doneghy*, 1 Duv. (Ky.) 220; *Stone v. Buckner*, 20 Miss. 73; *Allen v. Wood*, 3 Ired. Eq. (N. C.) 386; *Burrows v. M'Whann*, 1 Desaus. Ch. (S. Car.) 409; *McCormack v. O'Bannon*, 3 Munf. (Va.) 484. If the insolvent principal is made a party to a suit against a co-surety, for contribution in respect of money actually paid by the plaintiff for the principal, it is not necessary to prove the insolvency of the principal, but it will be necessary if the principal is not a party: *Lawson v. Wright*, 1 Cox Ch. 275. If the principal is shown to be insolvent, however, it is not necessary to prove a demand upon him: *Cage v. Foster*, 5 Yerg. (Tenn.) 261. But courts of law do not recognize this doctrine, and at law, therefore, a surety may recover contribution without showing the insolvency of the principal: *Roberts v. Adams*, 6 Port. (Ala.) 361; *Buckner v. Stewart*, 34 Ala. 529; *Sloo v. Pool*, 15 Ill. 47; *Judah v. Mieure*, 5 Blackf. (Ind.) 171; *Rankin v. Collins*, 50 Ind. 158; *Caldwell v. Roberts*, 1 Dana, (Ky.) 355; *Goodall*

v. Wentworth, 20 Me. 322; *Mosely v. Fullerton*, 59 Mo. App. 143; *Odlin v. Greenleaf*, 3 N. H. 270; *Brisendine v. Martin*, 1 Ired. L. (N. C.) 286; and since the union of law and equity powers in the same court, which exists now in most of the United States, this question is unimportant; and the right of contribution may now, as a general rule, be enforced without showing a demand upon or the insolvency of the principal. In Virginia, however, by statute, there is no right of contribution unless the principal is insolvent: *Strother v. Mitchell*, 80 Va. 149.

12. Amount of Contribution.—The amount of contribution varies with circumstances; on a simple undertaking, all are liable equally: *Tabor v. Cockrell*, (Tex.) 16 S. W. Rep. 786; and for this purpose a firm name signed by the partners counts as but one person: *Chaffee v. Jones*, 19 Pick. (Mass.) 260; but this may be varied by agreement among themselves as to the amount each shall be obliged to pay: *Paul v. Berry*, 78 Ill. 158; *Robertson v. Deatherage*, 82 Ill. 511; or by a similar agreement in the undertaking; and when this is the case, they are only bound to contribute in proportion to the amounts for which they are respectively bound: *In re MacDonaghs*, 10 Ir. R. Eq. 269; and neither can sue the other until he has paid more than his share of the debt: *Gourdin v. Trenholm*, 25 S. Car. 362. When several of the sureties have made payments on account of the debt for which they are bound, the amounts paid by all the parties must be added together, and the sum divided by the number of solvent sureties, to find the basis for contribution: *Gross v. Davis*, 87 Tenn. 226. If one surety compromises the claim: *Hickman v. McCurdy*, 7 J. J. Marsh. (Ky.) 555; *Sinclair v. Redington*, 56 N. H. 146; *Tarr v. Ravenscroft*, 12 Gratt. (Va.) 642; or pays it in depreciated paper: *Crozier v. Grayson*, 4 J. J. Marsh. (Ky.) 514; *Edmonds v. Sheahan*, 47 Tex. 443; he can recover from his co-sureties only a ratable proportion of the amount actually paid, or of the actual value of the currency in which he paid it. If a surety pays a judgment, executes it against the principal, sells the latter's property at a nominal price, buys it in, and then sues for a contribution, the co-sureties may show that the property purchased

at the execution sale was fairly worth enough to satisfy the judgment: *Sanders v. Weelburg*, 107 Ind. 266.

13. Amount of Contribution between Sureties on Different Instruments.—When two bonds are executed for the same principal and for the same debt, but in varying sums, contribution should be granted in the ratio those sums bear to each other, compounded with the ratio of the sureties on each: *Armitage v. Pulver*, 37 N. Y. 494; *Bell v. Jasper*, 2 Ired. Eq. (N. C.) 597; *Jones v. Hays*, 3 Ired. Eq. (N. C.) 502—*e. g.*, if one bond is for \$1,500, with two sureties, and the other for \$1,000, with three sureties, and the default of the principal is \$1,200, the sureties on the first bond pay three-fifths of \$1,200—*i. e.*, \$720, or \$360 each, while the sureties on the second bond pay two-fifths of \$1,200—*i. e.*, \$480, or \$160 each. A different rule is laid down in *Burnett v. Millsaps*, 59 Miss. 333, to the effect that all should contribute equally to the amount of the less bond, and the sureties on the larger bond only to the excess over that—*e. g.*, in the instance supposed, all five would contribute equally to the payment of \$1,000, or \$200 each, and the two sureties on the larger bond would pay the other \$200, or \$100 each additional, making the whole contribution of each \$300. This, though not supported by the weight of authority, seems to equalize matters better than the other rule. However, if the penalties of the bonds are equal and the sureties equal, no such question can arise; and if one person appears as surety on more than one bond, his liability on each will be cumulative. Thus in *Hughes v. Boone*, 81 N. C. 204, A. and B. were sureties on one guardian's bond, A. and C. on another, and two insolvents on a third. B. paid one-third of the amount of the default, but on suit against him by A. and C., who had paid the other two-thirds, he was held liable to pay them the difference between one-third and one-half, or one-sixth, since he was liable for one-half the default. If, however, one bond is a mere substitute for the other, the surety whose name appears on both will only be required to contribute *pro rata* the number of sureties. Thus, in *Coles v. Peyton*, [1893] 3 Ch. 238, a bond with two sureties provided that if either surety should die, and the principal did not within a month procure a solvent person to enter into a further bond

to the same effect as the present one, the principal debt should become immediately payable. One surety died, and a new bond was given with a new surety, providing that the estate of the deceased surety should not be released. Under these circumstances it was held that the estate of the deceased surety should contribute one-third of the principal sum mentioned in the bond, not one-half of one-half, or one-fourth, as contended.

14. Contribution when Some of the Sureties are Insolvent or out of the State.—Whenever one or more of the sureties is insolvent their shares are apportioned among the rest in settling the amount of contribution; or, in other words, the proper proportion which each should pay is determined by dividing the debt by the number of sureties who remain solvent. This was the rule in equity, and has been adopted by the courts of law: *Hole v. Harrison*, Rep. temp. Finch, 15; *Hitchman v. Stewart*, 3 Drew. 271; *Dallas v. Walls*, 29 L. T. N. S. 599; *Mayor of Berwick v. Murray*, 7 De G., M. & G. 497; *Young v. Clark*, 2 Ala. 264; *Couch v. Terry*, 12 Ala. 225; *Cummings v. May*, 91 Ala. 233; *Burroughs v. Lott*, 19 Cal. 125; *North v. Brace*, 30 Conn. 60; *Security Ins. Co. v. St. Paul Ins. Co.*, 50 Conn. 233; *Johnson v. Vaughn*, 65 Ill. 425; *Newton v. Pence*, 10 Ind. App. 672; *Breckinridge v. Taylor*, 5 Dana, (Ky.) 110; *Robertson v. Maxcey*, 6 Dana, (Ky.) 101; *Cobb v. Haynes*, 8 B. Mon. (Ky.) 137; *Young v. Lyons*, 8 Gill, (Md.) 162; *Stewart v. Goulden*, 52 Mich. 143; *Magruder v. Admire*, 4 Mo. App. 133; *Dodd v. Winn*, 27 Mo. 501; *Smith v. Mason*, 44 Neb. 610; *Henderson v. McDuffee*, 5 N. H. 38; *Boardman v. Paige*, 11 N. H. 431; *Harris v. Ferguson*, 2 Bailey, (S. Car.) 397; *Riley v. Rhea*, 5 Lea, (Tenn.) 115; *Gross v. Davis*, 87 Tenn. 226; *Acers v. Curtis*, 68 Tex. 423; *Mills v. Hyde*, 19 Vt. 59; *Preston v. Preston*, 4 Gratt. (Va.) 88; *Wayland v. Tucker*, 4 Gratt. (Va.) 267; *Robertson v. Trigg*, 32 Gratt. (Va.) 76; *Faurot v. Gates*, 86 Wis. 569; though the latter at first held that the rate of contribution was to be determined by the whole number of sureties, irrespective of their solvency: *Cowell v. Edwards*, 2 Bos. & P. 268; *Browne v. Lee*, 9 D. & R. 700; *Moore v. Bruner*, 31 Ill. App. 400; *Stothoff v. Dunham*, 19 N. J. L. 181; *Samuel v.*

Zachery, 4 Ired L. (N. C.) 377. On the other hand, if the creditor proves his whole claim against the estate of an insolvent surety, the creditors and representatives of the latter cannot recover contribution from the solvent sureties, unless the dividend received is greater than his just proportion of the debt would be if he were solvent: *Apperson v. Wilbourn*, 58 Miss. 439. If one or more of the sureties remove from the state it has the same effect as if they had become insolvent; the share of each of those who remain is determined by the number of solvent sureties within the jurisdiction: *Voss v. Lewis*, 126 Ind. 155; *Stewart v. Goulden*, 52 Mich. 143; *Boardman v. Paige*, 11 N. H. 431; *Jones v. Blanton*, 6 Ired. Eq. (N. C.) 115; *McKenna v. George*, 2 Rich. Eq. (S. Car.) 15; *Liddell v. Wiswell*, 59 Vt. 365; *Faurot v. Gates*, 86 Wis. 569. But the mere refusal of one surety to pay his due contribution will not authorize an increase in the amount recovered of the others: *Faires v. Cockerill*, (Tex.) 29 S. W. Rep. 669, reversed, on another point, 31 S. W. Rep. 190, 639.

The operation of these rules is very clearly shown in *Currier v. Baker*, 51 N. H. 613. The creditor had recovered judgment on a note signed by a corporation as principal and by eleven individuals as sureties, for \$9,933. This judgment was satisfied in part by a levy on the property of one of the sureties, C. F., for \$1,974, (more than his share,) and in a further sum by levy on the property of another for \$421. The corporation paid the rest, except about \$3,500. Meanwhile, five of the sureties died insolvent, and three of them left the state, including the two mentioned above, leaving only the plaintiff, the defendant and one M. within the state and solvent. Thereafter, by a compromise, the plaintiff and M. paid \$3,000 in full satisfaction of the balance of the judgment, plaintiff paying \$1,800, M. \$1,200; and some time afterwards B., another surety, who had left the state, paid the plaintiff \$450 as a contribution towards the amount paid by the latter, and the plaintiff agreed not to call on him for any other contribution. Then the plaintiff sued the defendant, who had paid nothing, for contribution of his share. In this action the court held, (1) That in the absence of evidence of any valid existing claim on the part of the representatives of C. F., the sum collected of him would not be considered

in determining the basis of contribution; (2) That the settlement with and discharge of B. would have the same effect as payment in full by B. of his share; (3) That the liability of the defendant was to be estimated on the basis that plaintiff, defendant, M. and B. should bear the burden of the payment of the \$3,000 equally.

15. Contribution to Costs of Suit.—The right of contribution extends to the costs and expenses incurred in defending a suit, if there were any reasonable grounds for defence. The costs are merged in the judgment, and the other expenses, being for the benefit of all alike, should be borne equally. But if the defence was merely frivolous or vexatious, the surety who maintained it should not be allowed relief from the consequences of his own wrongful act: *Kemp v. Finden*, 12 M. & W. 421; *Breckinridge v. Taylor*, 5 Dana, (Ky.) 110; *Davis v. Emerson*, 17 Me. 64; *Newcomb v. Gibson*, 127 Mass. 396; *Bright v. Lennon*, 83 N. C. 183; *McKenna v. George*, 2 Rich. Eq. (S. Car.) 15; *Preston v. Campbell*, 3 Hayw. (Tenn.) 20; *Marsh v. Harrington*, 18 Vt. 150; *Fletcher v. Jackson*, 23 Vt. 581; *Briggs v. Boyd*, 37 Vt. 534; but see *Knight v. Hughes*, 1 Mood. & M. 247. If the costs are lawfully incurred, however, the fact that the co-surety has performed his duty will not save him from contribution. Thus, in *Van Winkle v. Johnson*, 11 Oreg. 469, A., one of two sureties, paid half the debt before judgment; and judgment for the other half, with costs and attorney's fee, was given against B., the other surety; and it was held that A. must contribute to the costs. But if he had paid his share before the suit was begun, no liability for costs on his part would have existed. If an action is begun against all the parties to the instrument, and judgment is recovered against one only, he cannot claim contribution from the others in respect of costs, as that is not a common burden: *Boardman v. Paige*, 11 N. H. 431. These rules apply to attorney's fees: *Hoover v. Mowrer*, 84 Iowa, 43; *Gross v. Davis*, 87 Tenn. 226; see, however, *Comegys v. State Bk.*, 6 Ind. 357; but only to those actually paid, not to those stipulated for in the instrument creating the liability, if not in fact paid: *Acers v. Curtis*, 68 Tex. 423. Interest is also recoverable on contribution, at the legal rate on the amount paid, unless a less

rate is stipulated for in the instrument : *In re Swan's Estate*, 4 Ir. R. Eq. 209 ; *Miles v. Bacon*, 4 J. J. Marsh. (Ky.) 463 ; *Titcomb v. McAllister*, 81 Me. 399 ; *Bushnell v. Bushnell*, 77 Wis. 435 ; *contra*, *Onge v. Truelock*, 2 Moll. 42.

16. Co-sureties Entitled to the Benefit of Collateral Security.—All the sureties are entitled to share in the benefit of any security that one of them has received from the principal as an indemnity against his liability, as well as in the benefit of any agreement or other promise of indemnity he may have received from either the principal or the creditors, unless they have agreed to be excluded therefrom. This right is enforced by compelling a surrender of the security, by allowing it to be set off by the defendant, or by simply regarding the indemnity, when the secured surety is suing the others for contribution, as applied to the payment of the debt, which is thereby reduced *pro tanto*, and allowing him to recover from each co-surety only a proportionate part of what he has paid in excess of his due share over and above the value of the security or other indemnity ; and by refusing to allow him to set off the security in an action against him for contribution, unless, perhaps, he should agree to assign a due proportion of it to the plaintiff : *Pledge v. Buss*, Johns. 663 ; *Stirling v. Forrester*, 3 Bligh, 575 ; *Pearl v. Deacon*, 24 Beav. 186 ; *In re Arcedeckne*, 24 Ch. D. 709 ; *Lidderdale v. Robinson*, 12 Wheat. 594, affirming 2 Brock. (U. S.) 159 ; *John v. Jones*, 16 Ala. 454 ; *Steele v. Mealing*, 24 Ala. 285 ; *Tyus v. De Jarnette*, 26 Ala. 280 ; *Owen v. McGehee*, 61 Ala. 440 ; *Fishback v. Weaver*, 34 Ark. 569 ; *Gilbert v. Neely*, 35 Ark. 24 ; *Silvey v. Dowell*, 53 Ill. 260 ; *Comegys v. State Bk. of Indiana*, 6 Ind. 357 ; *Whiteman v. Harriman*, 85 Ind. 49 ; *Reinhart v. Johnson*, 62 Iowa, 155 ; *Hoover v. Mowrer*, 84 Iowa, 43 ; *Woodard v. Hamilton*, 85 Iowa, 745 ; *Seibert v. Thompson*, 8 Kans. 65 ; *Titcomb v. McAllister*, 81 Me. 399 ; *McPherson v. Talbott*, 10 Gill & J. (Md.) 499 ; *Guild v. Butler*, 127 Mass. 386 ; *Mueller v. Barge*, 54 Minn. 314 ; *McCune v. Belt*, 45 Mo. 174 ; *Mosely v. Fullerton*, 59 Mo. App. 143 ; *Brown v. Ray*, 18 N. H. 102 ; *Wolcott v. Hagerman*, 50 N. J. L. 289 ; *Scribner v. Hickok*, 4 Johns. Ch. (N. Y.) 531 ; *Cuyler v. Ensworth*, 6 Paige Ch. (N. Y.) 32 ; *Elwood v. Diefendorf*, 5 Barb. (N. Y.) 398 ;

Moore v. Moore, 4 Hawks, (N. C.) 358; Gregory v. Murrell, 2 Ired. Eq. (N. C.) 233; Kerns v. Chambers, 3 Ired. Eq. (N. C.) 576; Long v. Barnett, 3 Ired. Eq. (N. C.) 631; Hall v. Robinson, 8 Ired. L. (N. C.) 56; Fagan v. Jacocks, 4 Dev. L. (N. C.) 263; Parham v. Green, 64 N. C. 436; Butler v. Birkey, 13 Ohio St. 514; Agnew v. Bell, 4 Watts, (Pa.) 31; Croft v. Moore, 9 Watts, (Pa.) 451; Hess's Estate, 69 Pa. 272; Shaeffer v. Clendenin, 100 Pa. 565; Commonwealth v. Marsh, 149 Pa. 239; Burrows v. M'Whann, 1 Desaus. Ch. (S. Car.) 409; Glasscock v. Hamilton, 62 Tex. 143; Scott v. Rowland, (Tex.) 37 S. W. Rep. 380; Hinsdill v. Murray, 6 Vt. 136; Miller v. Sawyer, 30 Vt. 412; Aldrich v. Hapgood, 39 Vt. 617; Boughner v. Hall, 24 W. Va. 249. This rule applies, though the security or indemnity was given prior to the execution of the instrument on which the parties are sureties, if the fact that it was given was not known or consented to by the others: Cannon v. Conaway, 5 Del. Ch. 559; and though the one secured thereby only became a surety on the strength of that indemnity: Latouche v. Pallas, Hayes, 450; Steel v. Dixon, 17 Ch. D. 825. Accordingly, if the surety who pays the debt has received full indemnity, he has no right of contribution against his co-sureties: Morrison v. Taylor, 21 Ala. 779; Goodloe v. Clay, 6 B. Mon. (Ky.) 236; Ramsey v. Lewis, 30 Barb. (N. Y.) 403. One who receives a security or indemnity does not forfeit his right to contribution on that account, however: Mosely v. Fullerton, 59 Mo. App. 143; and therefore, after one surety has paid a judgment and issued execution thereon against a co-surety, the latter cannot arrest the execution by alleging that the plaintiff in the execution received security or indemnity from the principal; if the execution plaintiff is solvent, the defendant must pay his share of the debt, and then sue for an account; if he is insolvent, the defendant must seek relief in equity: Manning v. Weyman, (Ga.) 26 S. E. Rep. 58; moreover, after being compelled to share the security with his co-sureties, he can resort to it again to reimburse himself until he is fully repaid, or the security is exhausted: Berridge v. Berridge, 44 Ch. D. 168.

17. Sharing Collateral—Instances.—In Berridge v. Berridge, 44 Ch. D. 168, five sureties jointly and severally guaranteed

to a banking company the balance owing to them by a customer on his current account, to the extent of £2,000. Afterwards the principal debtor deposited with one of the sureties a policy of insurance on his own life, to secure that surety against all liability in respect of the suretyship. The principal debtor became bankrupt, owing more than £2,000 to the banking company, and on their demand the five sureties paid them £2,000 under the guaranty, in varying sums, the executors of the indemnified surety paying £400, their due share, two others paying £500 each and the other two £600 together. The principal debtor afterwards died, and the policy money was received by the estate of the surety with whom the policy had been deposited. The executors then stated a case for the opinion of the court, asking for advice as to the distribution of the proceeds of the policy; and it was held, that as the surety was bound to bring into hotchpot for the benefit of his co-sureties whatever he received out of the policy money in payment of the amount which he had paid under the guaranty, the deposit in effect enured for the benefit of all the co-sureties to the full extent of the principal debt, and that the policy money must, accordingly, be applied in repaying to the five co-sureties the amounts which they had respectively paid under the guaranty. In *Kelso v. Kelso*, (Ind.) 44 N. E. Rep. 1013, the principal conveyed land to one surety by absolute deed on a parol agreement for the security and protection of himself and his co-sureties. The latter paid the debt, but the grantee sold the land and refused to account. The co-sureties then brought a bill to compel the grantee of the land to account to them for their share of the indemnity; and it was held that this bill was not demurrable as seeking to establish and enforce a parol trust in lands, void under Rev. Stat. Ind. 1894, § 3391. So, in *Barge v. Van Der Horck*, 57 Minn. 497, one Westphal, as principal, and Barge and Mueller, as sureties, executed to Jonas F. Brown a note for \$4,000. Westphal, as principal, and Barge and Van Der Horck, as sureties, executed to Henry F. Brown a note for \$10,000, and at the same time Westphal assigned to Barge and Van Der Horck certain shares of stock for the purpose of securing them as indorsers or sureties on the \$10,000 note, and of securing Barge as indorser or surety on the \$4,000 note. Barge

and Mueller took up the \$4,000 note by each giving Jonas F. Brown his individual note for \$2,000. Barge paid his note for \$2,000. Barge and Van Der Horck paid the \$10,000, each paying one-half, or \$5,000. Barge and Van Der Horck then sold the stock assigned to them by Westphal for \$9,000, and believing and understanding that it was given and received solely for the purpose of securing them and nobody else, divided the proceeds between themselves, in good faith, in accordance with the understanding, Barge taking seven-twelfths, or \$5,250, and Van Der Horck five-twelfths, or \$3,750. Mueller's estate paid his note for \$2,000 to Jonas F. Brown, and then brought suit to compel Barge to contribute or pay over a *pro rata* share of the proceeds of the stock. The result of that suit was that Barge was obliged to pay to Mueller's estate \$1,285.72,—that is, two-fourteenths of \$9,000,—and Barge then sued to compel Van Der Horck to contribute five-twelfths of that, or \$535.70, out of the \$3,750 which he received in the division of the proceeds of the collateral stock. Van Der Horck demurred, and the demurrer was sustained; but this decision was reversed by the supreme court.

18. Collateral only Shared between those Liable to Contribute.—The right of sharing in the security or indemnity given to another surety only applies in cases where the sureties are jointly bound for the same debt; and not when their liabilities arise from different sources. Thus, in *Conrad v. Smith*, (Va.) 21 S. E. Rep. 501, a joint note with surety was taken up by one of the makers, by giving two other notes, one signed by the same surety and the other by another surety, to whom the maker's claim against his joint maker was assigned as collateral. The surety on the original note was compelled to pay the second note on which he became surety, and sought to share in the collateral given to the surety on the other note; but it was held that he had no right thereto. So, in *Hutchison v. Roberts*, 8 Houst. (Del.) 459, affirming 6 Del. Ch. 112, A., B. and C. severally became sureties for D. on three separate bonds, each arising out of separate transactions. Afterwards D. executed a judgment bond to A., B. and C., jointly, in the body of the conditions of which were the following words: "Note: This bond

is given as further security as my indorser on certain judgment bonds and for the mutual benefit of each party named in the within obligations, according to his liability for me as surety." Judgment was entered on this bond. A., B. and C. paid the sum for which they were respectively liable as sureties for D., and took assignments of the obligations therefor to themselves. The wife of D. subsequently paid B. and C. respectively the debts paid by them for her husband, and took an assignment at her risk of collection of their interests in the joint bond. A. then sued for a share of the money paid B. and C.; but it was held, that since A., B. and C. were sureties on separate instruments, growing out of separate transactions, they did not become co-sureties by being co-obligees in the bond of indemnity for those debts, and that A. could not recover.

19. Collateral not Shared, if Equity of Holder Superior.— If the surety who receives the indemnity or security has any equity superior to those of his co-sureties, he will not be compelled to share with them until that equity is satisfied. Accordingly, if he is also a creditor of the principal, a security given both for the debt and for his liability as surety will go to discharge the debt due him in the first instance; and will be applied to the exoneration of the co-sureties from liability to contribute only when that has been paid in full: *Magee v. Leggett*, 48 Miss. 139; *McCune v. Belt*, 45 Mo. 174; *Brown v. Ray*, 18 N. H. 102; *Hess's Estate*, 69 Pa. 272; *Field v. Hamilton*, 45 Vt. 35. So, when the surety has made several payments on account of the debt, contribution on some of which is barred by the statute of limitations, and the principal has subsequently given him security or indemnity less in amount than the payments barred, it will be presumed, in the absence of evidence of a contrary intention, that this security or indemnity was intended to apply to the barred payments, rather than to those not barred: *Bushnell v. Bushnell*, 77 Wis. 435. Similarly, a surety is not obliged to give his co-sureties the benefit of a *bona fide* debt due him from the principal, or from the creditor: *Davis v. Toulmin*, 77 N. Y. 280; or of a security given by a stranger—*e. g.*, the wife of the principal: *Leggett v. McClelland*, 39 Ohio St. 624; see *Hutchison v. Roberts*, 8 Houst. (Del.)

459, affirming 6 Del. Ch. 112 ; or of a security given in discharge of a prior liability, which it is insufficient to discharge: *Titcomb v. McAllister*, 81 Me. 399. Moreover, the indemnity only enures to them to the extent of its actual value in any case—*e. g.*, in *Keiser v. Beam*, 117 Ind. 31, where the judgment debtor conveyed to one surety, who was the owner of the judgment by assignment, real estate on which the judgment was a lien, in consideration of the payment by him of liens prior to the judgment, it was held that the judgment was not satisfied as to the co-surety beyond one-half of the amount of the value of the land in excess of the amount of liens which the grantee had agreed to pay.

20. Collateral must be Preserved for Benefit of Co-sureties.—Any action of a surety which results in injury to his co-sureties will defeat his claim for contribution: *Crisfield v. Murdock*, 127 N. Y. 315, affirming 55 Hun, 143 ; and, therefore, he is bound to realize on a security for the benefit of the others ; and if he does not do so, but surrenders it without their consent: *Taylor v. Morrison*, 26 Ala. 728 ; or simply fails to collect it: *Chilton v. Chapman*, 13 Mo. 470 ; *Kerns v. Chambers*, 3 Ired. Eq. (N. C.) 576 ; he loses his right to contribution. This principle extends to all cases in which the surety has an opportunity to protect himself. Thus, when a surety on a joint and several promissory note has in possession or under his control, at the maturity of the note, funds belonging to the principal, but instead of applying them to the payment of the note he allows judgment to be rendered against him on the note, and pays the funds over to the principal, he is not entitled to contribution from his co-sureties, though he afterwards pays the note and judgment from his own funds: *Neely v. Bee*, 32 W. Va. 519. A refusal to accept indemnity from the principal, however, will not defeat his right ; for he is under no obligation to accept it: *Smith v. Mason*, 44 Neb. 610.

21. Contribution Enforced by Subrogation.—In order to enforce contribution the surety will be subrogated to all the rights and remedies of the creditor. His payment of the debt does not extinguish it, so far as this right is concerned ; and he

may take an assignment of it, of the security for it, or of the judgment obtained upon it, which are all kept alive for his benefit, and may compel such an assignment if the creditor refuses; though in courts of equitable jurisdiction the mere payment of the debt creates an equitable assignment: *Latouche v. Pallas, Hayes*, 450; *In re Swan's Estate*, 4 Ir. R. Eq. 209; *Folsom v. Carli*, 5 Minn. 333; *McGinnis v. Loring*, 126 Mo. 404; *Neilson v. Fry*, 16 Ohio St. 552; *Dempsey v. Bush*, 18 Ohio St. 376; *Neal v. Nash*, 23 Ohio St. 483; *Burrows v. M'Whann*, 1 Desaus. Ch. (S. Car.) 409. But in some states, notably Alabama, Massachusetts, North Carolina and Vermont, he must take an assignment of a judgment to a third person for his use, or it will be extinguished: *State v. Hearn*, 109 N. C. 150; *Peebles v. Gay*, 115 N. C. 38; see *Preslar v. Stallworth*, 37 Ala. 402; *Adams v. Drake*, 11 Cush. (Mass.) 504; *Ætna Ins. Co. v. Wires*, 28 Vt. 93. If he pays the debt before it is due, he is entitled to subrogation when it becomes due, and if he takes an assignment thereof when he pays it, the legal title vests in him on the maturity of the debt, and he may then enforce it: *Felton v. Bissel*, 25 Minn. 15. He must sue upon it, however; and cannot at once issue execution in his own name upon a judgment thus assigned: *Chollar v. Temple*, 39 Ark. 238; except where authority to do so is given by statute: see *infra*, § 27. A surety who pays the debt may also set aside a fraudulent conveyance by his co-surety to defeat contribution: *Jenkins v. Lockard*, 66 Ala. 377; *Bowen v. Hoskins*, 45 Miss. 183; *Shurts v. Howell*, 30 N. J. Eq. 418; *Hawker v. Moore*, 40 W. Va. 49.

22. Limitation of Action for Contribution.—Since the right to contribution does not arise until one surety has paid more than his proportionate share of the debt, or his liability therefor has been fixed by the recovery of a judgment against him, the statute of limitations runs against the claim only from the time of that payment, and not from the date of the original obligation, though at the time of the action the statute may have run between the principal and the creditor, or between the co-surety and the creditor: *Davies v. Humphreys*, 6 M. & W. 153; *Wolmershausen v. Gullick*, [1893] 2 Ch. 514; *Broughton v. Robinson*, 11 Ala. 922; *Preslar v. Stallworth*, 37 Ala. 402;

Robinson v. Jennings, 7 Bush, (Ky.) 630; Hooper v. Hooper, (Md.) 31 Atl. Rep. 508; Wood v. Leland, 1 Metc. (Mass.) 387; Pass v. Grenada Co., 71 Miss. 426; Singleton v. Townsend, 45 Mo. 379; Sherrod v. Woodard, 4 Dev. (N. C.) 360; Ponder v. Carter, 12 Ired. L. (N. C.) 242. If, therefore, the surety makes successive payments, a new right of contribution accrues on each payment, and the statute begins to run as to that payment from that time: Bushnell v. Bushnell, 77 Wis. 435; see Gardner v. Brooke, [1897] 2 I. R. 6. So, if the surety promises to pay the debt on demand, a demand is necessary before bringing an action for the debt, and the statute will run only from the time of the demand: Brown v. Brown, [1893] 2 Ch. 300; and in case of a joint guaranty to pay on thirty days' notice, the statute does not run until thirty days after the payment, if one notifies the other of his intention to pay: Hooper v. Hooper, 81 Md. 155. If the surety pays the debt before it is barred, as against the co-sureties, by the statute of limitations, the right to contribution constitutes a new liability, which will not be barred by the running of the statute against the debt; but if it is not paid until the statute has run, though paid under a judgment in an action begun before the limitation expired, the right of contribution will not accrue: Shelton v. Farmer, 9 Bush, (Ky.) 314; Camp v. Bostwick, 20 Ohio St. 337; *contra*, with better reason, Glasscock v. Hamilton, 62 Tex. 143. Further, since the liability does not accrue until payment of the debt, a homestead is not exempt from execution on a judgment for contribution to a debt paid after the patent issued, under a statute providing that lands acquired under it "shall not be liable to the satisfaction of any debt contracted prior to the issue of the patent therefor:" Shoemake v. Stimson, (Wash.) 47 Pac. Rep. 218.

23. One Surety not Bound by Judgment against Another—Defences.—A surety is not concluded as to his liability for the debt by a judgment against his co-surety, unless he was a party to the suit: Lowndes v. Pinckney, 1 Rich. Eq. (S. Car.) 155; Glasscock v. Hamilton, 62 Tex. 143; and he may accordingly set up in a suit for contribution any defence which he might have made to the original claim, (except a release, dis-

charge or set-off of indemnity,) and also any defence which he has against the liability to contribution. It is a good defence that the statute of limitations has run against the original debt: *Cochran v. Walker*, 82 Ky. 220; that the plaintiff owes the principal more than he has paid on his account: *Bezzell v. White*, 13 Ala. 422; that the plaintiff has agreed to save him harmless, has accepted collateral security from him, or has released him: *Cummings v. May*, 91 Ala. 233; *Blake v. Cole*, 22 Pick. (Mass.) 97; (unless the consideration of the agreement fails, or the collateral proves worthless: *Johnson v. Vaughn*, 65 Ill. 425; *Davezac v. Seiler*, 93 Ky. 418;) that it was agreed that he should be liable only on failure of the others: *Craythorne v. Swinburne*, 14 Ves. 160; *Houck v. Graham*, 123 Ind. 277; that he signed under a mistake: *Bobbitt v. Shryer*, 70 Ind. 513; that he signed as surety solely on the inducement of the one who sues: *Turner v. Davies*, 2 Esp. 478; *Byers v. McClanahan*, 6 Gill & J. (Md.) 250; *contra*, *Bagott v. Mullen*, 32 Ind. 332; or that the suit was compromised without his consent: *Glasscock v. Hamilton*, 62 Tex. 143; but a discharge in bankruptcy on insolvency: *Byers v. Alcorn*, 6 Ill. App. 39; *Byers v. Bower*, 6 Ill. App. 48; *Ransom v. Keyes*, 9 Cow. (N.Y.) 128; *Smith v. Hodson*, 50 Wis. 279; or a judgment requiring the property of one surety to be first exhausted: *Githens v. Kimmer*, 68 Ind. 362; *Leaman v. Sample*, 91 Ind. 236; or a cause of action subsisting against the plaintiff, in favor of the principal: *O'Blenis v. Karing*, 57 N. Y. 649; is no defence.

24. Defences to Contribution — Fraud — Negligence — Laches.—If the surety is obliged to pay the debt through his own fault, he cannot ask his co-sureties to contribute. When a surety on a tax-collector's bond takes charge of the moneys collected, deposits them in the bank of which he is president, and refuses to pay them over to the treasurer when directed by the collector to do so, he has no right of contribution: *Crisfield v. Murdock*, 127 N. Y. 315, affirming 55 Hun, 143. So, if the manager of a corporation who is also surety for its debt, receives from it money which he should apply to that debt and misapplies it: *Simmons v. Camp*, 71 Ga. 54; or if an administrator or executor collects money belonging to an estate and loans it to

one who is insolvent, becoming surety for its payment : *Eshleman v. Bolenius*, 144 Pa. 269 ; he cannot call on his co-sureties for contribution. It is a good defence to an action by one surety on an official bond against his co-sureties for contribution that the breach of the bond for which he sues was due to his own negligence as deputy, or that he assisted the principal in committing it : *Scofield v. Gaskill*, 60 Ga. 277 ; *Healey v. Scofield*, 60 Ga. 450 ; *Block v. Estes*, 92 Mo. 318 ; and if the judgment paid was obtained in consequence of a fraudulent non-payment of a former judgment, the right to contribution is barred : *McCrary v. Parks*, 18 Ohio St. 1. Laches will also defeat a claim to contribution, as it will any other claim ; and though the mere lapse of time is not necessarily laches : *Owen v. McGehee*, 61 Ala. 440 ; yet a delay of eighteen years, without sufficient excuse, is fatal : *Pickering v. Leiberman*, 41 Fed. Rep. 376.

25. Effect of Discharge and Release of Surety by Creditor—Of Principal by Surety.—The discharge of one co-surety by the creditor, or his release through the neglect of the latter in allowing the statute of limitations to run against him, will not relieve him from liability to contribution, unless the discharge or release is such as to discharge the other sureties also, and one of which they may avail themselves. The liability to contribution *inter sese* is wholly separate from the liability to the creditor, and cannot be affected by any act of the latter : *Clapp v. Rice*, 15 Gray, (Mass.) 557 ; *Boardman v. Paige*, 11 N. H. 431 ; *Morgan v. Smith*, 70 N. Y. 537 ; *Camp v. Bostwick*, 20 Ohio St. 337. "The rule of law would seem to be, that, when one of two or more co-promisors, without assuming any new ground of liability, still continues liable upon the original contract to the promisee, and is lawfully compelled, by virtue of such contract, to pay the debt, or discharge the original liability of all the co-promisors to the promisee, in such case, the equitable liability of the other co-promisors for contribution of their fair proportion will still remain, notwithstanding any contract of the promisee for the relief of such other co-promisors, and notwithstanding they may be discharged by the operation of the statute of limitations from that liability to the promisee : " *Boardman v. Paige*, 11 N. H. 431. But if the creditor releases

one surety with the knowledge and acquiescence of the others: *Simmons v. Camp*, 64 Ga. 726; *Craven v. Freeman*, 82 N. C. 361; and *a fortiori* if in pursuance of an agreement between the sureties: *Moore v. Isley*, 2 Dev. & Bat. Eq. (N. C.) 372; the others cannot thereafter call on the one released for contribution. On the other hand, the liability to contribute is predicated on the liability of the principal, and therefore, if a release is given by one of the sureties to the principal for liability for all sums he should pay on his behalf, though given for the express purpose of enabling the principal to testify in a suit against another surety for contribution, the latter is discharged from all liability to contribute: *Hobart v. Stone*, 10 Pick. (Mass.) 215; *Fletcher v. Jackson*, 23 Vt. 581.

26. Practice—Parties—Pleading.—According to the American cases, since no liability is enforceable against an insolvent principal or surety, neither they nor their representatives are necessary parties to a bill in equity for contribution, but all the solvent sureties, or their representatives, should be joined: *Couch v. Terry*, 12 Ala. 225; *Johnson v. Vaughn*, 65 Ill. 425; *Moore v. Moberly*, 7 B. Mon. (Ky.) 299; *Young v. Lyons*, 8 Gill, (Md.) 162. The rule is otherwise in England: *Hole v. Harrison*, Rep. temp. Finch, 15; *Hitchman v. Stewart*, 3 Drew. 271; and in actions at law, where the co-sureties may be sued separately: *Voss v. Lewis*, 126 Ind. 155; *Powell v. Matthis*, 4 Ired. L. (N. C.) 83; (they must be so sued in Texas: *Graves v. Smith*, 4 Tex. Civ. App. 537; see *Murphy v. Gage*, (Tex.) 21 S. W. Rep. 396.) If two or more of the sureties have joined in paying off the debt of the principal according to a contribution agreed upon among themselves, they may join in an action to recover his proportion of the debt from a co-surety: *Clapp v. Rice*, 15 Gray, (Mass.) 557; *Fletcher v. Jackson*, 23 Vt. 581. It is not necessary, however, that notice of the payment of the debt should be given to the co-sureties, or that a demand for contribution should be made upon them prior to the bringing of the suit: *Collins v. Boyd*, 14 Ala. 505; *Taylor v. Reynolds*, 53 Cal. 686; *Wood v. Perry*, 9 Iowa, 479; *Morrison v. Poyntz*, 7 Dana, (Ky.) 307; *Chaffee v. Jones*, 19 Pick. (Mass.) 260; *Parham v. Green*, 64 N. C. 436; *Bright v.*

Lennon, 83 N. C. 183; Williams v. Williams, 5 Ohio, 444; Mason v. Pierron, 69 Wis. 585; *contra*, Carpenter v. Kelly, 9 Ohio, 106; see, also, Sherrod v. Woodard, 4 Dev. L. (N. C.) 360. In an action by a surety upon the bond of an insolvent executor against a co-surety for contribution, the petition alleged the execution of the bond by the plaintiff and defendant, the insolvency of the executor, the payment of his indebtedness to the estate of the testator by the plaintiff, on being threatened with suit, and the defendant's failure to contribute thereto; and it was held good against a general demurrer: Hardell v. Carroll, 90 Wis. 350.

27. Summary Remedy to Enforce Contribution.—In some states a summary remedy for enforcing contribution is given by statute. This usually consists of a motion in the cause to sue out execution against the co-surety upon the judgment in the original cause for the amount of his contributory share, or to show cause why a judgment should not be entered against him for that amount: Young v. Clark, 2 Ala. 264; Nation v. Roberts, 20 Ala. 544; Burke v. Mutch, 66 Ala. 568; Cating v. Stewart, 6 Blackf. (Ind.) 372; Lansdale v. Cox, 7 T. B. Mon. (Ky.) 401. The details of procedure vary in different states; but in general this remedy can only be had against those sureties included in the original judgment: Wilkerson v. Sampson, 56 Mo. App. 276; Hickerson v. Price, 7 Coldw. (Tenn.) 151; and the record should show all the necessary facts; especially the relation between the sureties: Batson v. Lasselle, 1 Blackf. (Ind.) 119; Odlin v. Greenleaf, 3 N. H. 270. Accordingly, if the summary judgment is taken by default, and the record contains no evidence that the plaintiff and defendant therein are sureties, or that a common liability existed between them, or the extent of that liability, or, if it is so shown to exist, that it was satisfied by the plaintiff, the judgment will be reversed: Weeks v. Yeend, 104 Ala. 546. In California the motion must be attended with notice to the defendant co-surety: Davis v. Heimback, 75 Cal. 261; in Maryland it will be granted after payment of the judgment: Wilson v. Ridgely, 46 Md. 235; and in general, to entitle the surety who pays the debt to a summary judgment for the excess over his due share, the payment must have been made only after judgment was recovered against

him. If he pays any part of it before judgment, he can recover, in the motion, only the excess of the amount paid after judgment over his due proportion, and the payment made before judgment will not be considered in that proceeding: *Wilkerson v. Sampson*, 56 Mo. App. 276. If the defendant appears and pleads to the motion, the suit proceeds like any other civil action: *Rutherford v. Smith*, 27 Ala. 417; and though it does not come within the statute, by reason of defects in the proceeding, yet if it states all that is essential in an action of *assumpsit*, or if there is an appearance without objection to the process or service, it will also be treated as a civil action: *Wilkerson v. Sampson*, 56 Mo. App. 276. The right to the motion only exists; however, so long as the parties remain in *statu quo*; and if the surety who pays the judgment procures an assignment of it to himself, he loses his right to the statutory remedy: *Hull v. Sherwood*, 59 Mo. 172.

28. Contribution between Insurers.—In the absence of any special agreement, a right of contribution arises between insurers upon the same interest on payment of the insurance by any one of them, for they stand in the relation of co-sureties to each other: *Godin v. London Assur. Co.*, 1 Burr. 492; *Peoria M. & F. Ins. Co. v. Lewis*, 18 Ill. 553; *Hough v. People's Ins. Co.*, 36 Md. 398; *Liverpool Ins. Co. v. Verdier*, 33 Mich. 138; *Tuck v. Hartford Fire Ins. Co.*, 56 N. H. 326; *Lucas v. Jefferson Ins. Co.*, 6 Cow. (N. Y.) 635; *Stacey v. Franklin Fire Ins. Co.*, 2 W. & S. (Pa.) 506; *Merrick v. Germania Fire Ins. Co.*, 54 Pa. 277; but if, as is now usual, the policy contains a provision that in case of double insurance such insurer shall only be liable for its respective proportion of the loss, one that pays more than its share has no right of contribution, since that only attaches when the party who paid the debt was under a legal obligation to pay it: *Haley v. Ins. Co.*, 12 Gray, (Mass.) 545; *Lucas v. Jefferson Ins. Co.*, 6 Cow. (N. Y.) 635. So, if a warehouseman or carrier has insured goods to indemnify the owner, the insurance company cannot have contribution against one who insured the owner directly until it pays the full amount for which the warehouseman or carrier is liable: *Deming v. Merchants' Cotton Press & Storage Co.*, 90 Tenn. 306.

29. Contribution between Indorsers of Negotiable Paper.— Since the undertaking of the successive indorsers of negotiable paper, such as bills, checks and notes, is usually merely to be liable in case of the default of those whose names precede theirs, their liability is several and not joint, and no right of contribution exists between them, in the absence of a special agreement that they shall be bound jointly: *McCarty v. Roots*, 21 How. 432; *Rey v. Simpson*, 22 How. 341; *Gillespie v. Campbell*, 39 Fed. Rep. 724; *Moody v. Findley*, 43 Ala. 167; *Kirschner v. Conklin*, 40 Conn. 77; *Givens v. Merchants' Bk.*, 85 Ill. 442; *Core v. Wilson*, 40 Ind. 204; *Syme v. Brown*, 19 La. An. 147; *Smith v. Morrill*, 54 Me. 48; *Coolidge v. Wiggin*, 62 Me. 568; *Rhinehart v. Schall*, 69 Md. 352; *Weston v. Chamberlin*, 7 Cush. (Mass.) 404; *Clapp v. Rice*, 13 Gray, (Mass.) 403; *Sweet v. McAllister*, 4 Allen, (Mass.) 353; *Woodward v. Severance*, 7 Allen, (Mass.) 340; *Mulcare v. Welch*, 160 Mass. 58; *McGurk v. Huggett*, 56 Mich. 187; *McCune v. Belt*, 45 Mo. 174; *Paul v. Rider*, 58 N. H. 119; *Davis v. Morgan*, 64 N. C. 570; *Ross v. Espy*, 66 Pa. 481; *Chalmers v. McMurdo*, 5 Munf. (Va.) 252; *Bank v. Vanmeter*, 4 Rand. (Va.) 553; *Bank v. Beirne*, 1 Gratt. (Va.) 265; *Hogue v. Davis*, 8 Gratt. (Va.) 4; but see *contra*, *Stovall v. Border Grange Bk.*, 78 Va. 188; *Shields v. Reynolds*, 9 W. Va. 483; *Hoge v. Vintroux*, 21 W. Va. 1; *Willis v. Willis*, (W. Va.) 26 S. E. Rep. 515. They may become co-obligors by express agreement, however, in which case a right to contribution will arise: *Phillips v. Preston*, 5 How. 278; *Farwell v. Ensign*, 66 Mich. 600; *Seward v. Huntington*, 94 N. Y. 104; *Kerr's Estate*, 4 D. R. (Pa.) 696; s. c., 17 Pa. C. C. 193; though one who has been induced to indorse by fraudulent representations will be indemnified: *Hayden v. Thrasher*, 28 Fla. 162. The indorsers do not contribute to a surety on the note: *Armstrong v. Harshman*, 61 Ind. 52; and an agreement by an indorser to become surety, made after judgment against the maker, is without consideration: *Pfluger v. Wilshusen*, 17 N. Y. Suppl. 516.

The same rules apply to accommodation indorsers: *McDonald v. Magruder*, 3 Pet. 470; *Shaw v. Knox*, 98 Mass. 214; *Hillegas v. Stephenson*, 75 Mo. 118; *Easterly v. Barber*, 66 N. Y. 433; *Kelly v. Burroughs*, 102 N. Y. 93; *Phillips v. Plato*, 42

Hun, (N. Y.) 189; except in Georgia, by statute: Code Ga. § 2151; Freeman v. Cherry, 46 Ga. 14; Hull v. Myers, 90 Ga. 674; and in North Carolina, where accommodation indorsers have always been regarded by the courts as co-sureties, and entitled to contribution *inter se*: Daniel v. McRae, 2 Hawks, (N. C.) 590; Dawson v. Pettway, 4 Dev. & Bat. (N. C.) 396; Atwater v. Farthing, 118 N. C. 388; and *a fortiori*, an accommodation indorser who has been secured by collateral cannot have contribution from others: Van Patten v. Ulrich, 13 N. Y. Suppl. 940. But when a maker applied to the accommodation indorsers severally, and each said he would indorse if the others would, nothing being said as to the order of liability, and the note was sent to each to sign, just as they happened to be found, without any design as to precedence of signature, it was held that their undertaking was joint, and formed the basis of a claim for contribution: Hagerthy v. Phillips, 83 Me. 336.

III. CONTRIBUTION BETWEEN JOINT OWNERS OF PROPERTY.

30. Contribution Allowed for Expenses Incurred for Benefit of Common Property.—Whenever one of two or more joint owners of property has expended his own money for the benefit of the joint estate, he may have contribution from the others, if the expenditure was necessary and proper, or was assented to by them: Rogers v. MacKenzie, 4 Ves. 752; Leigh v. Dickeson, 12 Q. B. D. 194; Young v. Williams, 17 Conn. 393; Gardner v. Diederichs, 41 Ill. 158; Mumford v. Brown, 6 Cow. (N. Y.) 475; Dech's Appeal, 57 Pa. 467; or if they knew it, and did not object: Percy v. Millaudon, 18 Mart. (La.) 616; Webb v. Laird, 62 Vt. 448. Thus, contribution will be enforced in favor of one tenant in common who has paid the rent or taxes due on the common estate, or who has made necessary repairs, etc.: Wilton v. Tazwell, 86 Ill. 29; Gosselin v. Smith, 154 Ill. 74; Van Brunt v. Gordon, 53 Minn. 227; Allen v. Poole, 54 Miss. 323; Mumford v. Brown, 6 Cow. (N. Y.) 475; Ward v. Ward, 40 W. Va. 611; see *infra*, § 31; in favor of a member of a firm who pays a firm debt with his own funds, or buys in an outstanding title to protect the interests of the firm: Sears v. Starbird, 78 Cal. 225; Burgess v. Badger, 124 Ill. 288; Whetstone v. Shaw, 70 Mo. 575; Converse v. Hobbs, 64 N. H. 42; Preston v.

Fitch, 137 N. Y. 41; see *infra*, §§ 35–39; in favor of stockholders who pay a debt of the corporation: Allen v. Fairbanks, 45 Fed. Rep. 445; Redington v. Cornwell, 90 Cal. 49; Richter v. Henningsan, 110 Cal. 530; Wolters v. Henningsan, 114 Cal. 433; Gray v. Coffin, 9 Cush. (Mass.) 192; Aspinwall v. Sacchi, 57 N. Y. 331; Farrow v. Bivings, 13 Rich. Eq. (S. Car.) 25; see *infra*, § 40; and in favor of one joint owner of a ship who pays for repairs made to it, if necessary for the prosecution of the voyage or the preservation of the vessel: Hill v. Crocker, 87 Me. 208; Starbuck v. Shaw, 10 Gray, (Mass.) 492; Sheehan v. Dalrymple, 19 Mich. 239; though not in the absence of an agreement, express or implied, sanctioning such repairs: Brodie v. Howard, 17 C. B. 109; Curling v. Robertson, 7 M. & G. 336; Hardy v. Sproule, 31 Me. 71; Pentz v. Clarke, 41 Md. 327; Stedman v. Feidler, 20 N. Y. 437. Further, one who pays a judgment rendered on a suit to enforce a special tax may have contribution against co-owners who were not made parties to the tax suit: Schneider Granite Co. v. Taylor, 2 Mo. App. Repr. 914; and a devisee of a life estate in land, who pays a mortgage thereon given by the testator, to preserve the land to himself and the remainderman, may recover contribution from the latter: Boue v. Kelsey, 53 Ill. App. 295. But the ownership must be joint; and therefore, when A. owned a room on the lower floor of a dwelling-house, and the cellar, and B. owned the chamber over A.'s room, and the rest of the house, it was held that B. could not recover from A. contribution to the cost of repairs to the roof, since they owned distinct dwelling-houses: Loring v. Bacon, 4 Mass. 575; and when a lessee sublet parts of the same premises to two persons, each covenanting to pay the original rent, it was held that one sub-lessee who paid the whole rent, on the bankruptcy of his lessor, under threat of distraint by the paramount lessor, was not entitled to contribution from his fellow sub-lessee: Johnson v. Wild, 44 Ch. D. 146.

31. Contribution between Tenants in Common.—A tenant in common may be compelled to contribute to necessary expenses incurred by his co-tenant in the management of the estate: Sullivan v. Brennan, (Iowa,) 63 N. W. Rep. 678; *e. g.*, in paying taxes, rents and encumbrances: Wilton v. Tazwell,

86 Ill. 29; *Weare v. Van Meter*, 42 Iowa, 128; *Van Brunt v. Gordon*, 53 Minn. 227; *Davidson v. Wallace*, 53 Miss. 475; *Allen v. Poole*, 54 Miss. 323; *Watson's Appeal*, 90 Pa. 426; *In re Devlin's Estate*, 17 Pa. C. C. 433; s. c., 5 D. R. 125; *Haverford Loan & Bldg. Assn. of Phila. v. Dougherty*, (Pa.) 37 Atl. Rep. 179; in redeeming from a tax sale: *Wilmot v. Lathrop*, 67 Vt. 671; in defending the title: *Gosselin v. Smith*, 154 Ill. 74; and in making necessary repairs, if he has first requested his co-tenants to make them, or consent to his making them, but not otherwise: *Gardner v. Diederichs*, 41 Ill. 158; *Doane v. Badger*, 12 Mass. 65; *Calvert v. Aldrich*, 99 Mass. 74; *Stevens v. Thompson*, 17 N. H. 103; *Mumford v. Brown*, 6 Cow. (N. Y.) 475; *Taylor v. Baldwin*, 10 Barb. (N. Y.) 582; *Denman v. Prince*, 40 Barb. (N. Y.) 213; *Anderson v. Greble*, 1 Ashm. (Pa.) 136; *Kidder v. Rixford*, 16 Vt. 169; *Ward v. Ward*, 40 W. Va. 611; though if the co-tenant is absent and the repairs are beneficial, his assent will be presumed, without the formality of a request: *Haven v. Mehlgarten*, 19 Ill. 91. But mere improvements, without the assent of the co-tenant, give no right to contribution: *Drennen v. Walker*, 21 Ark. 539; *Bazemore v. Davis*, 55 Ga. 504; *Elrod v. Keller*, 89 Ind. 382; *Alexander v. Ellison*, 79 Ky. 148; *Walter v. Greenwood*, 29 Minn. 87; *Stevens v. Thompson*, 17 N. H. 103; *Taylor v. Baldwin*, 10 Barb. (N. Y.) 582; *Crest v. Jack*, 3 Watts, (Pa.) 238; *Dech's Appeal*, 57 Pa. 467; *Beaty v. Bordwell*, 91 Pa. 438; *Thompson v. Bostick*, 1 McMull. Eq. (S. Car.) 75; *Thurston v. Dickinson*, 2 Rich. Eq. (S. Car.) 317. But though a tenant in common, who improves the property at his own expense, without the assent of his co-tenants, cannot maintain an action of *assumpsit*, for contribution from them, equity will not grant a partition of the property without directing an account and suitable compensation for the improvements, and the statute of limitations does not run against the claim for reimbursements until a partition is asked: *Carver v. Coffman*, 109 Ind. 547; *Van Ormer v. Harley*, (Iowa,) 71 N. W. Rep. 241; *Ford v. Knapp*, 102 N. Y. 135; *Wilmot v. Lathrop*, 67 Vt. 671; *Ballou v. Ballou*, (Va.) 26 S. E. Rep. 840. So, if they do assent afterwards, they will be liable for their *pro rata* shares: *Baird v. Jackson*, 98 Ill. 78; *Prentice v. Janssen*, 79 N. Y. 478; *Houston v.*

McCluney, 8 W. Va. 135. There is no distinction in principle as to the right to recover contribution for money necessarily expended on the common property between a tenant in common who holds the legal title at the time of the expenditure, and one who then was in fact owner of an undivided portion of the premises, having completed the contract of purchase, agreed on all the terms thereof, and gone into possession, but had not yet received his deed : Williams v. Coombs, 88 Me. 183.

32. Party-walls—Express Agreement to Contribute to Cost of Erection.—In the absence of an agreement to contribute to the cost of erecting a party-wall (*i. e.*, a wall erected partly on the land of each of two adjoining owners, of which they are tenants in common : Cubitt v. Porter, 8 B. & C. 257 ; Standard Bk. of B. S. A. v. Stokes, 9 Ch. D. 68 ; Watson v. Gray, 14 Ch. D. 192 ; Regina v. Copp, 17 Ont. Rep. 738 ; Orman v. Day, 5 Fla. 385 ; Montgomery v. Trustees, 70 Ga. 38 ; Brown v. Werner, 40 Md. 15 ; Sherred v. Cisco, 4 Sandf. (N. Y.) 480 ; or of which each owns a longitudinal half, with an easement in the other half : Graves v. Smith, 87 Ala. 450 ; Ingals v. Plamondon, 75 Ill. 118 ; Gibson v. Holden, 115 Ill. 199 ; Bloch v. Isham, 28 Ind. 37 ; Hoffman v. Kuhn, 57 Miss. 746 ; Nash v. Kemp, 49 How. Pr. (N. Y.) 522 ; Partridge v. Gilbert, 15 N. Y. 601 ; Hendricks v. Stark, 37 N. Y. 106 ; Brooks v. Curtis, 50 N. Y. 639 ; Cutting v. Stokes, 25 N. Y. Suppl. 365 ; Burton v. Moffit, 3 Oreg. 29 ; Sanders v. Martin, 2 Lea, (Tenn.) 213 ; Andrae v. Haseltine, 58 Wis. 395 ;) the one who erects it cannot compel contribution from the other : Antomarchi v. Russell, 63 Ala. 356 ; Preiss v. Parker, 67 Ala. 500 ; Orman v. Day, 5 Fla. 385 ; McCord v. Herrick, 18 Ill. App. 423 ; Wilkins v. Jewett, 139 Mass. 29 ; Sherred v. Cisco, 4 Sandf. (N. Y.) 480 ; Sanders v. Martin, 2 Lea, (Tenn.) 213 ; and *a fortiori*, if a wall is built wholly on the ground of one, he cannot have contribution from an adjoining owner who makes use of it, in the absence of an agreement, or damage from that use : Bisquay v. Jeunelot, 10 Ala. 245 ; Abrahams v. Krautler, 24 Mo. 68 ; an express agreement to contribute, however, will bind the one who makes it, for it rests upon valuable consideration : Zeininger v. Schnitzler, 48 Kans. 63, 66 ; Ensign v. Sharp, 72 Ga. 708 ; Nelson v.

McEwen, 35 Ill. App. 100 ; McEwen v. Nelson, 40 Ill. App. 272 ; Stehr v. Raben, 33 Neb. 437 ; Rindge v. Baker, 57 N. Y. 209 ; Masson's Appeal, 70 Pa. 26 ; Arnold v. Chamberlain, (Tex.) 39 S. W. Rep. 201 ; McCourt v. McCabe, 46 Wis. 596 ; and if it is to pay a share of the cost whenever he wishes to use the wall, he becomes liable thereon when he sells the property : Nalle v. Paggi, 81 Tex. 201 ; see Rawson v. Bell, 46 Ga. 19 ; if the agreement is parol, it only binds the one who makes it, not his grantee : Jenkins v. Spooner, 5 Cush. (Mass.) 419 ; Joy v. Boston Penny Sav. Bk., 115 Mass. 60 ; Rice v. Roberts, 24 Wis. 461 ; but if written, it is a disputed question whether it is a personal contract, or runs with the land, the weight of authority inclining to the former view : Gibson v. Holden, 115 Ill. 199, affirming 16 Ill. App. 411, and disapproving Roche v. Ullman, 104 Ill. 11 ; Behrens v. Hoxie, 26 Ill. App. 417 ; Bloch v. Isham, 28 Ind. 37 ; Eckleman v. Miller, 57 Ind. 88 ; Pillsbury v. Morris, 54 Minn. 492 ; Kells v. Helm, 56 Miss. 700 ; Cole v. Hughes, 54 N. Y. 444 ; Scott v. McMillan, 76 N. Y. 141, disapproving Brown v. Pentz, 1 Abb. App. Dec. (N. Y.) 227 ; Hart v. Lyon, 90 N. Y. 663 ; Sebald v. Mulholland, 11 Misc. Rep. (N. Y.) 714, affirming 26 N. Y. Suppl. 913 ; Todd v. Stokes, 10 Pa. 155 ; Gilbert v. Drew, 10 Pa. 219 ; though the opposite doctrine is also well supported : Thomson v. Curtis, 28 Iowa, 229 ; Savage v. Mason, 3 Cush. (Mass.) 500 ; Maine v. Cumston, 98 Mass. 317 ; Bronson v. Coffin, 108 Mass. 175 ; Richardson v. Tobey, 121 Mass. 457 ; Jordan v. Kraft, 33 Neb. 844 ; Platt v. Eggleston, 20 Ohio St. 414 ; and it may be made to run with the land by joining it with others that so run : Kimm v. Griffin, (Minn.) 69 N. W. Rep. 634 ; if, however, the deed is made subject to the agreement to contribute, the grantee is liable : Mott v. Oppenheimer, 135 N. Y. 312, affirming 15 N. Y. Suppl. 166 ; and if it merely mentions it he will be held to have assumed it, as in case of a mortgage : Christie v. Mitchison, 36 L.T. N. S. 621 ; Stewart v. Aldrich, 8 Hun, (N. Y.) 241 ; and the same is true when he has notice of the agreement dehors the deed : Garmire v. Willy, 36 Neb. 340 ; Mott v. Oppenheimer, 135 N. Y. 312, affirming 15 N. Y. Suppl. 166 ; Mithoff v. Hughes, 5 Ohio Cir. Ct. 120 ; where the covenant to contribute is held to be personal, the right to recover on it belongs to the original owner, though he has assigned ; Frohman v. Dickinson, 11 Misc. Rep. (N. Y.) 9 ;

and he may assign it independently of the land: *Pillsbury v. Morris*, 54 Minn. 492; but when it is held to run with the land the grantee of the builder is entitled to recover it: *Halpine v. Barr*, 21 D. C. 331; *Knowles v. Ott*, (Tex.) 34 S. W. Rep. 295.

83. Party-walls—Implied Agreement to Contribute to Cost of Erection.—In those states where it is provided by statute that one who builds may erect his wall partly on the land of the adjoining owner, an agreement to contribute will be implied, whether the statute creates such a liability or not, and no express agreement is necessary; but it seems that no liability arises until the other makes use of the wall: *Zugenbuhler v. Gilliam*, 3 Clarke, (Iowa,) 391; *Thomson v. Curtis*, 28 Iowa, 229; *Bertram v. Curtis*, 31 Iowa, 46; *Pew v. Buchanan*, 72 Iowa, 637; *Deere, Wells & Co. v. Weir-Shugart Co.*, 91 Iowa, 422; *Davis v. Grailhe*, 14 La. An. 338; *Costa v. Whitehead*, 20 La. An. 341; *Auch v. Labouisse*, 20 La. An. 553; *Marion v. Johnson*, 23 La. An. 597; *Irwin v. Peterson*, 25 La. An. 300; *Dannaker v. Riley*, 14 Pa. 435; *Roberts v. Bye*, 30 Pa. 375; *Allen v. Cass-Stauffer Co.*, 11 Pa. C. C. 231; *Heiland v. Cooper*, 38 W. N. C. (Pa.) 560. But a mere appropriation of the wall does not necessarily oblige the adjoining owner to pay half the cost. The nature and cost of his erection must be taken into consideration, and if it be a mere temporary shed or lean-to, he will not be compelled to contribute at all: *Beggs v. Duling*, (Iowa,) 70 N. W. Rep. 732; *Shaw v. Hitchcock*, 119 Mass. 254; *Heimbach's Appeal*, (Pa.) 7 Atl. Rep. 737. In Pennsylvania, by statute, the right to compensation for the use of the wall runs with the land, and goes to the purchaser: *Knight v. Beenken*, 30 Pa. 372. So that if the adjoining owner buys the other lot, the builder of the wall has no claim against him: *Voight v. Wallace*, 179 Pa. 520. If there are equitable reasons therefore, an agreement to contribute will be implied; *e. g.*, when the one who erects the wall expects the other to share the cost, and the latter has reason to know that he so expects, but fails to disclaim any liability therefor: *Huck v. Flentye*, 80 Ill. 258; *Day v. Caton*, 119 Mass. 513. In such cases contribution may be recovered at law, as well as in equity: *Walker v. Stetson*, 162 Mass. 86.

34. Party-walls — Contribution to Cost of Repairs.—If a party-wall becomes unsafe, one owner may repair or rebuild it, and recover contribution from the other; but if it is not manifestly unsafe, or if it is destroyed by fire, he cannot then do so without an express or implied agreement to share in the expense: *Antomarchi v. Russell*, 63 Ala. 356; *Orman v. Day*, 5 Fla. 385; *Campbell v. Mesier*, 4 Johns. Ch. (N. Y.) 334; *Campbell v. Mesier*, 6 Johns. Ch. (N. Y.) 21; *Berry v. Todd*, 14 Daly, (N. Y.) 450; *Sherred v. Cisco*, 4 Sandf. (N. Y.) 480; *List v. Hornbrook*, 2 W. Va. 340. If, however, the other permits him to go on without objection, assent will be presumed: *Huck v. Flentye*, 80 Ill. 258; *Day v. Caton*, 119 Mass. 513; and though an addition made without notice or assent will not found a claim for contribution, an assent thereto will support it: *Sanders v. Martin*, 2 Lea, (Tenn.) 213.

35. Contribution between Partners.—Since the partners of a firm are jointly and severally liable for its debts, one partner who pays a firm debt with his own funds is entitled to contribution from his copartners, as in the case of other joint obligors: *Sears v. Starbird*, 78 Cal. 225; *Mussetter v. Timmerman*, 11 Colo. 201; *Clouch v. Moyer*, 23 Kans. 405; *Noel v. Bowman*, 2 Litt. (Ky.) 46; *Turner v. Turner*, (Ky.) 5 S. W. Rep. 457; *Maginnis v. Crosby*, 11 La. An. 400; *Whetstone v. Shaw*, 70 Mo. 575; *Dakin v. Graves*, 48 N. H. 45; *Converse v. Hobbs*, 64 N. H. 42; *Preston v. Fitch*, 137 N. Y. 41; *Scott v. Bryan*, (N. C.) 3 S. E. Rep. 235; *Kelly v. Kauffman*, 18 Pa. 351; *Eakin v. Knox*, 6 Rich. L. (S. Car.) 14; *Forbes v. Webster*, 2 Vt. 58; unless the other has already paid his due share of the debts of the firm: *Fletcher v. Brown*, 7 Humph. (Tenn.) 385. This principle applies to all sorts of partnerships, where there is no express or implied agreement to the contrary; *e. g.*, to a partnership formed for the purpose of a single real estate deal: *Timberlake v. Hughes*, 2 Mo. App. Repr. 1160; and to the members of an unincorporated association: *Hodgson v. Baldwin*, 65 Ill. 532; and to all payments made for the joint benefit of the partners: *e. g.*, when a member of a firm buys in an outstanding title to protect the interests of the firm: *Burgess v. Badger*, 124 Ill. 288; or redeems land from an execution sale: *Downs v. Jackson*, 33 Ill.

464. The right exists against the estate of a deceased partner: *Olleman v. Reagan*, 28 Ind. 109; *Phillips v. Blatchford*, 137 Mass. 510; *Allen v. Blanchard*, 9 Cow. (N. Y.) 631; *Logan v. Dixon*, 73 Wis. 533; *Logan v. Trayser*, 77 Wis. 579; and in favor of the representatives of a deceased partner: *Sells v. Hubbell*, 2 Johns. Ch. (N. Y.) 394. Contribution between partners, as in other cases, is effected by subrogation to the rights of the creditor whose debt is paid; but it is held, in some jurisdictions, that equity will not preserve the lien of a judgment for that purpose, since partners are not entitled to the equities accorded to sureties: *Bartlett v. McRae*, 4 Ala. 688; *Hinton v. Odenheimer*, 4 Jones Eq. (N. C.) 406; this, however, is hardly the general rule.

36. When Contribution will not be Enforced between Partners.—If there is an express agreement that there shall be no contribution, or if the facts attending the formation of the partnership and the carrying on of its affairs show that there is an implied understanding that there shall be none, no such right exists. Thus, when one partner furnishes only money, and the other contributes only time, labor and skill, each, as a general rule, must bear his own loss in case of failure, without contribution from the other, though the respective proportions of the different contributions to the capital are disproportionate. This rule, however, is not an inflexible one, but depends entirely on the circumstances of each case: *Manley v. Taylor*, 50 N. Y. Super. Ct. 26. So, when one partner furnishes goods, which the other is to sell, and the firm gives a joint and several note to reimburse a purchaser of damaged goods, the one who furnishes the goods will be primarily liable on the note, and cannot have contribution from the other: *Morris v. Neel*, 78 Ga. 797; and when a mining partnership was formed on the terms that the defendant was to furnish the money necessary, and that part of the profits were to be applied in extinguishing his advances, by giving him one-half a cent on each bushel of coal mined at a profit, and then dividing the rest of the profits equally, and the business resulted in a loss, it was held that the defendant had no right to contribution from the other partner: *McCormick v. Stofer*, (Ky.) 12 S. W.

Rep. 151. Similarly, a partner who has assigned his interest in the firm to another with the consent of his copartners, is not liable to contribute to firm debts subsequently paid, though due at the time of the assignment: *Savage v. Putnam*, 32 N. Y. 501. The right to contribution may be lost by laches: *Johnson v. Peck*, 58 Ark. 580; *Compton v. Thorn*, 90 Va. 653.

37. Indemnity of Partner.—The right to contribution as such exists only so long as the partner who seeks it is primarily liable for the debt which he is compelled to pay; and if he is not so liable he may recover full indemnity from those who are liable. Accordingly, when one partner retires from the firm with the consent of the others, the remaining partners, or the successors to the firm, if they agree to pay the firm debts, are primarily liable therefor, as between themselves and the retiring partner, and the latter merely occupies the position of a surety for the debt; and he can therefore recover of them the full amount of an existing debt, which he is compelled to pay, if they received assets sufficient to pay it; otherwise, indemnity to the amount of the assets and contribution as to the deficiency: *Rodgers v. Maw*, 4 Dowl. & L. 66; *Aflalo v. Fourdrinier*, 6 Bing. 306; *Wood v. Dodgson*, 2 M. & S. 195; *Oakeley v. Pasheller*, 4 Cl. & Fin. 207; *Chandler v. Higgins*, 109 Ill. 602; *Williams v. Boyd*, 75 Ind. 286; *Barber v. Gillson*, 18 Nev. 89; *Sizer v. Ray*, 87 N. Y. 220; *Gilmore v. Ham*, 61 Hun, (N. Y.) 1; *Johnson v. Young*, 20 W. Va. 614; and for this purpose is subrogated to the remedies of the creditor: *Butler v. Birkey*, 13 Ohio St. 514; *Fleming v. Beaver*, 2 Rawle, (Pa.) 128; *Ætna Ins. Co. v. Wires*, 2 Williams, (Vt.) 93. The relation of principal and surety also exists when the retiring partner has failed to give notice of his retirement, and is consequently liable for debts subsequently contracted: *Shamburg v. Abbott*, 17 W. N. C. (Pa.) 298; and the same rule applies when the retiring partner sells his interest in the firm to his copartners: *Vanness v. Dubois*, 64 Ind. 338. Similarly, if, on dissolution, one partner receives all the assets of the partnership, and undertakes to pay all the liabilities of the firm, a partner who is compelled to pay a firm debt may recover indemnity to the extent of the assets and contribution for any deficiency in the assets: *Cook v. Jenkins*, 35 Ga. 113;

Hinkle *v.* Reid, 43 Ind. 390; Myers *v.* Smith, 15 Iowa, 181; Gilmore *v.* Ham, 61 Hun, (N. Y.) 1; but the one who settles the affairs has no right to contribution if the assets are sufficient to meet all liabilities: Mendez *v.* Schleuter, 9 N. Y. Suppl. 278. Thus, in Hobbs *v.* Wilson, 1 W. Va. 50, a partner retired by consent, and a new firm was formed, which received the assets of the old. A judgment recovered against the old firm for a debt contracted prior to the retirement of the partner was paid in part by him; and it was held that the new firm was bound to save him harmless as far as the assets of the old firm would go, but no farther; and that he might have contribution for any amount paid in excess of those assets. But the right of indemnity only exists in respect of debts which the remaining or incoming partners agreed to pay. In Mussetter *v.* Timmerman, 11 Colo. 201, the plaintiff sold his interest in the firm to an incoming partner, who agreed to assume the debts of the firm. A schedule was made out by the plaintiff and his co-partner, which was supposed to contain all the debts of the firm; but some were omitted by mistake, and the plaintiff paid these. It was held that he was entitled to contribution. So, in McLucas *v.* Durham, 20 S. Car. 302, on the dissolution of a partnership, one partner, M., took all the assets and assumed all the debts. On the books there were certain deposits to the credit of E., and debts by E. to the partnership, the balance in E.'s favor being \$700, which was understood by the partners to be the real debt of the firm to E. E.'s deposits were trust funds, and were recovered against three of the partners for the full amount. M. paid the debt, and sued the others for contribution. It was held that he was solely liable only for the \$700, and could recover contribution for the balance. Further, when one person induces another, by false and fraudulent representations, to enter into partnership with him, the latter may rescind the contract of partnership, and throw all the partnership losses upon the former: Pillans *v.* Harkness, Colles, 442; Rawlins *v.* Wickham, 3 De G. & J. 304; Newbigging *v.* Adam, 34 Ch. D. 582.

38. Contribution for Torts of Partner.—The fact that the partnership transaction out of which the debt grew was an

illegal one will not defeat the right to contribution, unless the partnership was entered into for an illegal object: *Betts v. Gibbins*, 2 Ad. & El. 57; *Lingard v. Bromley*, 1 Ves. & B. 114; *Baynard v. Wolley*, 20 Beav. 583; *Ashhurst v. Mason*, 20 L. R. Eq. 225; *Smith v. Ayrault*, 71 Mich. 475; and a partner who is innocent of any participation in a breach of the law committed by his copartner, is entitled to indemnity from the latter *Campbell v. Campbell*, 7 Cl. & Fin. 166. But if the partner who is compelled to pay the liability knew or should have known that the act was illegal, he cannot recover contribution from his copartners: *Aubert v. Maze*, 2 Bos. & P. 371; *Thomas v. Atherton*, 10 Ch. D. 185; *e. g.*, there can be no contribution between the partners of a gambling partnership, such as a bucket-shop, or other scheme of a similar nature: *Watson v. Fletcher*, 7 Gratt. (Va.) 1; and if one member of a firm is guilty of a conversion of public moneys while acting in the name of the firm, another partner who had full knowledge of and assented to the act of the former is not entitled to contribution from him: *Davis v. Gelhaus*, 44 Ohio St. 69.

39. No Contribution until Partnership Accounts are Settled.—There is no right of action for contribution between partners, until the affairs of the partnership are settled and a balance is found to exist in favor of one or the other; and consequently the statute of limitations does not begin to run against such a claim until after the settlement of the partnership accounts: *Bailey v. Starke*, 6 Ark. 191; *Houston v. Brown*, 23 Ark. 333; *Crossley v. Taylor*, 83 Ind. 337; *Lang v. Oppenheim*, 96 Ind. 47; *Harris v. Harris*, 39 N. H. 45; *McDonald v. Holmes*, 22 Oreg. 212; *Fulton's Appeal*, 95 Pa. 323 (by statute); *Compton v. Thorn*, 90 Va. 653; *Logan v. Dixon*, 73 Wis. 533. After a settlement, however, an action will lie either in equity or at law: *McGunn v. Hanlin*, 29 Mich. 476; *Wheeler v. Arnold*, 30 Mich. 304; *Clarke v. Mills*, 36 Kans. 393; *Brown v. Agnew*, 6 W. & S. (Pa.) 235. In *Logan v. Trayser*, 77 Wis. 579, where an action had been brought in the names of all the other partners against the heirs of a deceased partner to recover the amount of the indebtedness of a firm over and above its assets chargeable to such deceased partner, an accounting was had, and

the amount of that indebtedness which each partner was bound to pay was determined; and it was held, that an action at law would lie by the partners who paid all the indebtedness to recover from the other surviving partners their proportionate share. The debt must, of course, be paid before an action for contribution will lie: *Phillips v. Blatchford*, 137 Mass. 510; though it has been held that a bill will lie on behalf of part of the members of an unincorporated voluntary association, for an account and contribution, before payment of the debt: *Hodgson v. Baldwin*, 65 Ill. 532.

40. Contribution between Stockholders.—A stockholder of a corporation, who has been compelled to pay more than his just share of the corporate debts, may maintain an action against his fellow-stockholders for contribution, although the liability imposed is in the nature of a penalty: *Sutton's Case*, 3 De G. & Sm. 262; *Allen v. Fairbanks*, 45 Fed. Rep. 445; *Sherwood v. Dunbar*, 6 Cal. 53; *Redington v. Cornwell*, 90 Cal. 49; *Stewart v. Lay*, 45 Iowa, 604; *Matthews v. Albert*, 24 Md. 527; *Gray v. Coffin*, 9 Cush. (Mass.) 192; *Hadley v. Russell*, 40 N. H. 109; *Judson v. Rossie Galena Co.*, 9 Paige Ch. (N. Y.) 598; *Aspinwall v. Torrance*, 1 Lans. (N. Y.) 381; *Stover v. Flack*, 30 N. Y. 64; *Aspinwall v. Sacchi*, 57 N. Y. 331; *Umsted v. Buskirk*, 17 Ohio St. 113; *Farrow v. Bivings*, 13 Rich. Eq. (S. Car.) 25. *Contra*, *Larson v. Dayton*, 52 Iowa, 597; *Andrews v. Callender*, 13 Pick. (Mass.) 484; *Skinner v. White*, 1 Hopk. Ch. (N. Y.) 107; *Hopkins v. Whitesides*, 1 Head, (Tenn.) 31. Thus, a stockholder in a distillery, who has been compelled to pay more than his share of the internal revenue tax, is entitled to contribution from the others: *Richter v. Henningsan*, 110 Cal. 530; *Wolters v. Henningsan*, 114 Cal. 433; but not for the costs of securing the release of a distillery which has been seized by the government officers for non-payment of tax: *Wolters v. Henningsan*, 114 Cal. 433. The right to contribution in such cases is expressly given by statute in some states: *Cary v. Holmes*, 16 Gray, (Mass.) 127; *Lowry v. Inman*, 46 N. Y. 119; *Brinham v. Wellersburg Coal Co.*, 47 Pa. 43; *O'Reilly v. Bard*, 105 Pa. 569; *Sayles v. Bates*, 15 R. I. 342; but the stockholders are not restricted to the statutory remedy: *Guerney v. Moore*, 131 Mo.

650; and they may claim the benefit of the statute imposing liability on other stockholders: *Brown v. Merrill*, 107 Cal. 446. If, however, the payment by the stockholder is voluntary: *Andrews v. Callender*, 13 Pick. (Mass.) 484; *Cary v. Holmes*, 2 Allen, (Mass.) 498; or is for a debt incurred through his own wrong: *Haldeman v. Ainslie*, 82 Ky. 395; *Stone v. Fenno*, 6 Allen, (Mass.) 579; or if the aggregate debts of the corporation exceed the aggregate liabilities of all the stockholders: *Mason v. Alexander*, 44 Ohio St. 318; there can be no contribution.

When the right to contribution exists it cannot be enforced in a court of common law, but only in one of equity or equitable jurisdiction, unless otherwise provided by statute: *Meisser v. Thompson*, 108 Ill. 359, affirming 9 Ill. App. 368; *Koons v. Martin*, 66 Hun, (N. Y.) 554; and will be effected by subrogating the stockholder who pays the debt to the rights of the creditor against the other stockholders: *Redington v. Cornwell*, 90 Cal. 49; *City Bk. v. Crossland*, 65 Ga. 734; but it can be enforced in the courts of a foreign state or in the federal courts: *Allen v. Fairbanks*, 45 Fed. Rep. 445; under the decisions in *Huntington v. Attrill*, [1893] A. C. 150, and *Huntington v. Attrill*, 146 U. S. 657, which overruled in this respect the ridiculous position taken in *Sayles v. Brown*, 40 Fed. Rep. 8, that the statutes creating a liability to creditors on the part of stockholders was penal, and could not be enforced extraterritorially. These rules apply to the stockholders of a national bank: *Casey v. Galli*, 94 U. S. 673; see *Kennedy v. Gibson*, 8 Wall. 498.

IV. CONTRIBUTION BETWEEN JOINT TORT-FEASORS.

41. General Rule.—As a general rule, no right of contribution exists in favor of one wrongdoer against another who has participated in the wrongful act, though the former has been compelled to pay the whole damage. Each is severally liable for the whole of the injury done, and has no equity to be reimbursed to any degree by the other. His hands are not clean, and neither law nor equity will aid him: *Mitchell v. Cockburne*, 2 H. Bl. 379; *Merryweather v. Nixan*, 8 T. R. 186; *Shackell v. Rosier*, 2 Bing. N. C. 634; *Atty. Gen. v. Wilson*, Cr. & Ph. 1; *Colburn v. Pat-*

more, 1 Cr., M. & R. 73; *Betts v. Gibbins*, 2 Ad. & El. 57; *Selz v. Unna*, 6 Wall. 327; *Herr v. Barber*, 2 Mackey, (D. C.) 545; *Rend v. Chicago W. D. Ry. Co.*, 8 Ill. App. 517; *Becker v. Farwell*, 25 Ill. App. 432; *Hunt v. Lane*, 9 Ind. 248; *Nichols v. Nowling*, 82 Ind. 488; *Minnis v. Johnson*, 1 Duv. (Ky.) 171; *Sincer v. Bell*, (La.) 18 So. Rep. 755; *Percy v. Clary*, 32 Md. 245; *Churchill v. Holt*, 131 Mass. 67; *Peck v. Ellis*, 2 Johns. Ch. (N. Y.) 131; *Coventry v. Barton*, 17 Johns. (N. Y.) 142; *Miller v. Fenton*, 11 Paige Ch. (N. Y.) 18; *Wehle v. Haviland*, 42 How. Pr. (N. Y.) 399; *Acheson v. Miller*, 18 Ohio, 1; *Cumpston v. Lambert*, 18 Ohio, 81; *Philadelphia v. Collins*, 68 Pa. 106; *Rhea v. White*, 3 Head, (Tenn.) 121; *Anderson v. Saylors*, 3 Head, (Tenn.) 551; *Gulf, C. & S. F. Ry. Co. v. Galveston, H. & S. A. Ry. Co. & N. Y., T. & M. Ry. Co.*, 83 Tex. 509; *Atkins v. Johnson*, 43 Vt. 78. This principle applies to a mere omission or breach of duty, either common law or statutory, if committed knowingly or wilfully, as well as to the actual perpetration of a tort by fraud, deceit or physical injury: *Andrews v. Murray*, 33 Barb. (N. Y.) 354; *Spalding v. Oakes*, 42 Vt. 343; and whenever the person who is liable is presumed to know that his act is unlawful: *Humphrys v. Pratt*, 5 Bligh, N. R. 154; *Stanton v. McMullen*, 7 Ill. App. 326; *e. g.*, there is no right of contribution between two saloon-keepers who sell liquor to a drunkard that causes his death: *Johnson v. Torpy*, 35 Neb. 604; *Torpy v. Johnson*, 43 Neb. 882; *Zigler v. Rommel*, 30 Wkly. Law Bull. (Ohio,) 115. Accordingly, whenever a transaction involves moral turpitude, *e. g.*, a breach of trust, there can be no contribution among those who share in it: *Herr v. Barber*, 2 Mackey, (D. C.) 545; see *infra*, § 46; and a wrongdoer who pays a judgment obtained against himself and others cannot acquire a right to contribution by taking a nominal assignment of the judgment to another: *Boyer v. Bolender*, 129 Pa. 324. So, if one partner of a firm converts public moneys, there is no right of contribution among those of the partners who had full knowledge of the conversion and assented to it: *Davis v. Gelhaus*, 44 Ohio St. 69. But in *Goldsborough v. Darst*, 9 Ill. App. 205, two men conspired to release their land from the lien of a mortgage by fraudulently procuring a sale to be made of the land of a third party instead of their own. One

of them was afterwards obliged to pay to this third party the amount of which he had been defrauded under a decree in equity. He then sued his co-conspirator for contribution, and it was held that the rule as to joint tort-feasors did not apply, and he could recover.

42. Rule when Parties are not Guilty of Wilful Wrong or Deliberate Negligence.—The doctrine laid down above, however, is limited to cases where the person seeking contribution either acted wilfully, knowing the illegal nature of his action, or negligently, when he should have known its nature. If he acted honestly, neither knowing nor being under any duty to know that the act was wrongful, he may either recover a proper proportion of the amount he has had to pay, or be wholly indemnified, according to circumstances: *Adamson v. Jarvis*, 4 Bing. 66; *Wooley v. Batte*, 2 C. & P. 417; *Pearson v. Skelton*, 1 M. & W. 504; *Palmer v. Wick & Pulteneytown S. S. Co.*, [1894] A. C. 318; *Moore v. Appleton*, 26 Ala. 633; *Bailey v. Bussing*, 28 Conn. 455; *Jacobs v. Pollard*, 10 Cush. (Mass.) 287; *Sherner v. Spear*, 92 N. C. 148; *Acheson v. Miller*, 2 Ohio St. 203; *Horbach v. Elder*, 18 Pa. 33; *Armstrong Co. v. Clarion Co.*, 66 Pa. 218. Accordingly, when several joint owners of property become liable to a third person for the torts of a servant or agent, committed without their instrumentality or connivance, they may have contribution *inter se*: *e. g.*, in the case of the joint proprietors of a stage, boat, or other vehicle of a common carrier: *Wooley v. Batte*, 2 C. & P. 417; *Bailey v. Bussing*, 28 Conn. 455; *Horbach v. Elder*, 18 Pa. 33; see *Pearson v. Skelton*, 1 M. & W. 504; or of a bridge maintained jointly by two counties: *Armstrong Co. v. Clarion Co.*, 66 Pa. 218; or of a building, erected by two owners, which falls through the negligence of the builder: *Ankeny v. Moffett*, 37 Minn. 109; and contribution will be enforced in every case in which the parties acted *bona fide*, in the belief that their acts were rightful. Thus, when several attaching creditors, at the time of suing out their writs, act in good faith, exercising such prudence and caution as an ordinarily prudent person would, with no intention of committing a trespass or of injuring any one, but with the honest belief that a transfer of goods made by their debtor is

fraudulent as to creditors, the right of contribution will exist as between the attaching creditors, although it may turn out that the seizure of the goods was unlawful, and each will be compelled to pay his just proportion of a recovery to one of them who pays the judgment and costs: *Vandiver v. Pollak*, 97 Ala. 467; *Vandiver v. Pollak*, (Ala.) 19 So. Rep. 180; *Farwell v. Becker*, 127 Ill. 261, reversing 25 Ill. App. 432; *Selz v. Guthman*, 62 Ill. App. 624. Contribution between tort-feasors is in some states permitted by statute: *Ankeny v. Moffett*, 37 Minn. 109. Whenever the right exists, it extends to costs and counsel fees properly incurred in defending the suit: *Percy v. Clary*, 32 Md. 245; and the statute of limitations will not begin to run against it, until the claim of the person injured is established against one of those liable therefor: see *Robinson v. Harkin*, [1896] 2 Ch. 415.

43. Indemnity in Case of Mere Negligence.—If one tort-feasor is only a passive party to the tort, suffering, through mere ignorance or simple negligence, a state of affairs to exist which permits the other to perpetrate the wrong complained of, so that they are not only not *in pari delicto*, but the one seeking contribution is chargeable with wrong through the operation of a rule of law alone, it would be a manifest violation of the simplest rules of justice that he should suffer, and the other, the really guilty party, go scot-free. Accordingly, in such a case, the innocent party can recover from the actual wrongdoer, not merely a *pro rata* contribution to the damages he has been compelled to pay, but complete indemnity, including all additional charges to which he has been put in consequence of the act of the latter. Thus, the owner of premises which have been rendered unsafe by the act of another, of which he is ignorant, can recover from the latter indemnity for damages recovered of him by one who is injured as a result of the dangerous condition of the premises: *Severin v. Eddy*, 52 Ill. 189; *Minneapolis Mill Co. v. Wheeler*, 31 Minn. 121; *Littleton v. Richardson*, 34 N. H. 179; *Congreve v. Morgan*, 18 N. Y. 84; *Fulton v. Tucker*, 3 Hun, (N. Y.) 529; and under such circumstances a lessee may recover from a sub-lessee indemnity for the tort of the latter: *Oceanic Steam Nav. Co. v. Compania Transatlantica Espanola*, 134 N. Y. 461. So, an

owner who has been compelled to pay damages for the negligence of a servant or contractor can recover indemnity from the latter, if he can prove him to have been primarily liable: *Power v. Munger*, 52 Fed. Rep. 705; *Brooklyn v. Brooklyn City R. Co.*, 47 N. Y. 475; *Mayor v. Brady*, 24 N. Y. Suppl. 296; *Gulf, C. & S. F. Ry. Co. v. Galveston, H. & S. A. Ry. Co. & N. Y., T. & M. Ry. Co.*, 83 Tex. 509; *City of Denison v. Sanford*, (Tex.) 21 S. W. Rep. 784: see *Sincer v. Bell*, 47 La. An. 1548. This rule is applied with greatest frequency to cases where a municipal corporation charged by law with the duty of keeping its highways in proper repair and in a safe condition for travel, is compelled, either with or without suit brought, if its liability is clear, to compensate a person injured by the negligence of a third person in whose acts the corporation had no share. In such case it can recover from the actual wrongdoer the full amount of the damages it has paid, with costs of suit: *Power v. Hoey*, 19 W. R. 916; *Chicago v. Robbins*, 2 Black, (U. S.) 418; *Robbins v. Chicago*, 4 Wall. 657; *Norwich v. Breed*, 30 Conn. 535; *Gridley v. Bloomington*, 68 Ill. 47; *Centerville v. Woods*, 57 Ind. 192; *Independence v. Jekel*, 38 Iowa, 427; *Portland v. Richardson*, 54 Me. 46; *Lowell v. Boston & Lowell R. R. Corp.*, 23 Pick. (Mass.) 24; *Lowell v. Short*, 4 Cush. (Mass.) 275; *Lowell v. Spaulding*, 4 Cush. (Mass.) 277; *Boston v. Worthington*, 10 Gray, (Mass.) 496; *Milford v. Holbrook*, 9 Allen, (Mass.) 17; *Woburn v. Henshaw*, 101 Mass. 193; *West Boylston v. Mason*, 102 Mass. 341; *Woburn v. Boston & L. R. R. Co.*, 109 Mass. 283; *Campbell v. Somerville*, 114 Mass. 334; *Westfield v. Mayo*, 122 Mass. 100; *Rochester v. Montgomery*, 72 N. Y. 65, affirming 9 Hun, 394; *Port Jervis v. Bk.*, 96 N. Y. 550; *Rochester v. Campbell*, 123 N. Y. 405. This principle applies *a fortiori*, when the negligent act is done without right; and therefore it has been held that when one digs a ditch upon the land of another, without license, and the latter is without fault, he can recover of the former the amount paid by him on a judgment for damages caused by the existence of the ditch: *Westfield Gas & Milling Co. v. Noblesville & E. Gravel Road Co.*, 13 Ind. App. 481. So, in *Gray v. Boston Gas Light Co.*, 114 Mass. 149, the defendant attached to the plaintiff's chimney, without his permission, a telegraph wire,

which rendered it unsafe and finally caused it to fall. When it fell it injured a horse and wagon that were passing by, for which injury the plaintiff was compelled to pay; and he was permitted to recover the amount so paid from the defendant.

44. Indemnity to Agents and Servants.—When an agent or servant, at the command of his employer or master, does an act which is not manifestly illegal, and which he does not know to be such, but believes *bona fide* to be justifiable, the rule as to joint tort-feasors does not apply, and a promise of indemnity to him will be implied, in case he is compelled to pay for the wrong: *Betts v. Gibbins*, 2 Ad. & El. 57; *Adamson v. Jarvis*, 4 Bing. 66; *Toplis v. Grane*, 5 Bing. N. C. 636; *Dugdale v. Lovering*, 10 L. R. C. P. 196; *Moore v. Appleton*, 26 Ala. 633; *Moore v. Appleton*, 34 Ala. 147; *Long v. Neville*, 36 Cal. 455; *Stocking v. Sage*, 1 Conn. 519; *Nelson v. Cook*, 17 Ill. 443; *Tarr v. Northey*, 17 Me. 113; *Gower v. Emery*, 18 Me. 79; *Drummond v. Humphreys*, 39 Me. 347; *Bond v. Ward*, 7 Mass. 123; *Greene v. Goddard*, 9 Metc. (Mass.) 212; *Howard v. Clark*, 43 Mo. 344; *Ramsay v. Gardner*, 11 Johns. (N. Y.) 439; *Powell v. Newburgh*, 19 Johns. (N. Y.) 284; *Chamberlain v. Beller*, 18 N. Y. 115; *Howe v. Buffalo, N. Y. & E. R. R. Co.*, 37 N. Y. 297; *Acheson v. Miller*, 2 Ohio St. 203; *Spangler v. Commonwealth*, 16 S. & R. (Pa.) 68; *Commonwealth v. Vandyke*, 57 Pa. 34; *Grace v. Mitchell*, 31 Wis. 533. Accordingly, a sheriff, who is directed by the plaintiff to levy on property which does not belong to the defendant in the execution, may recover of the former the damages he is compelled to pay for the wrongful levy: *Humphrys v. Pratt*, 5 Bligh, N. R. 154; *Nelson v. Cook*, 17 Ill. 443; and an agent whose principal has refused to fulfil a contract made for him can recover of the latter the damages which he has been compelled to pay for breach of contract: *Saveland v. Green*, 36 Wis. 612. So, if the agent buys for the principal, and the latter refuses to pay for the goods, in consequence of which the agent is arrested and made to pay for them himself, he can recover the price of the goods, the costs of the suit, and counsel fees paid: *Clark v. Jones*, 16 Lea, (Tenn.) 351.

45. Express Promise of Indemnity.—A promise to indemnify another against the consequences of an act which is manifestly a trespass is void; but if the act be apparently legal, the promise is valid: *Fletcher v. Harcot*, Hutt. 55; *Moore v. Appleton*, 26 Ala. 633; *Marcy v. Crawford*, 16 Conn. 549; *Nelson v. Cook*, 17 Ill. 443; *Stanton v. McMullen*, 7 Ill. App. 326; *Avery v. Halsey*, 14 Pick. (Mass.) 174; *Allaire v. Ouland*, 2 Johns. Cas. (N. Y.) 52; *Coventry v. Barton*, 17 Johns. (N. Y.) 142; *Stone v. Hooker*, 9 Cow. (N. Y.) 154; *Ives v. Jones*, 3 Ired. L. (N. C.) 538; *Cumpston v. Lambert*, 18 Ohio, 81. It has been held, however, that the promise must have some other consideration than the mere facts of the innocence of the promisee and the guilt of the promisor: *Nichols v. Nowling*, 82 Ind. 488.

46. Contribution between Co-trustees.—The right of contribution between co-trustees is governed by the rules already laid down. If they have been guilty of a wilful breach of trust, or have knowingly permitted the assets of the trust estate to be dissipated, there is no right of contribution, for they are joint tort-feasors; but if one of them has been guilty of nothing but passive negligence or ignorance, he may have contribution from the others, if they have been acting trustees, or have derived some personal benefit from their breach of trust: *Birks v. Micklethwait*, 33 Beav. 409; *Atty. Gen. v. Daugars*, 33 Beav. 621; *Fetherstone H. v. West*, 6 Ir. Rep. Eq. 86; *Butler v. Butler*, 7 Ch. D. 116; *Bahin v. Hughes*, 31 Ch. D. 390; and contribution may be enforced between the estates of deceased trustees: *Priestman v. Tindall*, 24 Beav. 244; see *In re Palk*, 41 W. R. 28. In *Robinson v. Harkin*, [1896] 2 Ch. 415, the plaintiff, who was trustee of a marriage settlement, allowed the trust funds to be in the hands of the defendant, his co-trustee, for investment. The defendant entrusted the whole fund to a stock-broker, who was what is termed an "outside" broker—*i. e.*, not a member of the stock exchange—and this broker applied a portion of it to his own use. The plaintiff and infant *cestui que trust* under the settlement then brought suit; and the defendant denied his liability, and claimed contribution against the plaintiff trustee. On the trial of the action, STIRLING, J., held, that the defendant, not

having exercised proper care in the selection of a broker, and having improperly left the whole amount of the trust fund in the broker's hands, was liable for the loss that had occurred; that the plaintiff was *in pari delicto* with the defendant, and that the latter was therefore entitled to contribution from the former, and that as between the two trustees, time did not begin to run under the statute of limitations until the date of the judgment in the action. So, contribution may be enforced among assignees in bankruptcy or insolvency: *Lingard v. Bromley*, 1 Ves. & B. 114; and a solicitor to whom the care of a trust estate has been committed will be compelled to indemnify his co-trustees for losses due to his breach of trust: *Lockhart v. Reilly*, 25 L. J. Ch. 697. But neither contribution nor indemnity can be enforced in a suit instituted against the trustees for a breach of trust for which all are liable: *Fletcher v. Green*, (No. 2,) 33 Beav. 513.

47. Indemnity from Beneficiary.—If the breach of trust has been advised and furthered by one of the beneficiaries of the trust estate, he will be compelled to indemnify the trustees, but only so far as his interest goes, unless he promises further indemnity: *Trafford v. Boehm*, 3 Atk. 440; *Browne v. Maunsell*, 5 Ir. Ch. Rep. 351; *Raby v. Ridehalgh*, 7 De G., M. & G. 104; *Ricketts v. Ricketts*, 64 L. T. N. S. 263; *Griffith v. Hughes*, [1892] 3 Ch. 105; but if the beneficiary be a married woman, it must be shown on the part of the trustees that she acted for herself, and was fully informed of the state of the case and the consequences of her and their action: *Sawyer v. Sawyer*, 28 Ch. D. 595.

48. Contribution between Directors of a Corporation.—If a director of a corporation has been guilty of a positive wrong, either alone, or jointly with his co-directors, and is compelled to pay the damage caused thereby, he cannot have contribution against his fellows. Thus, in *Boyer v. Bolender*, 129 Pa. 324, a director of a corporation, who had paid a judgment recovered against himself and others for the fraudulent appropriation of the corporate funds to their own use and had it assigned to his son, sued his co-defendants for contribution, and it was held

that he could not recover. If, however, he has merely been guilty of the neglect of a duty, for omission to perform which all the directors are made equally liable for corporate debts, such as the omission to file an annual report, he may then enforce contribution from them, or their estates: *Ramskill v. Edwards*, 31 Ch. D. 100; *Nickerson v. Wheeler*, 118 Mass. 295; *contra*, *Andrews v. Murray*, 33 Barb. (N. Y.) 354, reversing 9 Abb. Pr. (N. Y.) 8; *Baird v. Midvale Steel Works*, 12 Phila. (Pa.) 255; but if the liability is predicated on a positive misfeasance, such as the incurring of a debt in excess of the limit set by law, he has no claim to contribution: *Rogers v. Bonnett*, 2 Okl. 553. Further, if the directors occupy the position of mere sureties for a corporate debt, they may have contribution *inter se*: *Slaymaker v. Gundacker*, 10 S. & R. (Pa.) 75; see *Ashhurst v. Mason*, 20 L. R. Eq. 225. They are not entitled, however, in any case, to contribution from the stockholders: *Heald v. Owen*, 79 Iowa, 23; *Stone v. Fenno*, 6 Allen, (Mass.) 579; see *Connecticut River Sav. Bk. v. Fiske*, 62 N. H. 178.

V. CONTRIBUTION IN CASE OF JOINT LOSSES.

49. One Who Pays the Whole of a Joint Loss Entitled to Contribution.—When a loss which might have fallen upon any one of several persons is made to fall upon one alone, the latter is entitled to contribution from the others. This rule applies in the case of a general average loss: *Wilson v. Cross*, 33 Cal. 60; *The Toledo F. & M. Ins. Co. v. Speares*, 16 Ind. 52; *Bevan v. Bk. of U. S.*, 4 Whart. (Pa.) 301; *Nimick v. Holmes*, 25 Pa. 366; an heir who pays the debts of his ancestor on deficiency of assets can recover a proportionate share thereof from his co-heirs: *Taylor v. Taylor*, 8 B. Mon. (Ky.) 419; *Clowes v. Dickenson*, 5 Johns. Ch. (N. Y.) 235; *Schermerhorn v. Barhydt*, 9 Paige Ch. (N. Y.) 28; legatees whose legacies have been voluntarily paid by the executor may be compelled to contribute to the payment of a debt of the estate, under similar circumstances: *Robins's Estate*, 4 D. R. (Pa.) 277; and a specific devisee of property taken to pay debts on a deficiency of assets, can compel other devisees and legatees to contribute, if the debts were not charged on the specific property devised:

Glass v. Dunn, 17 Ohio St. 413; Snow v. Callum, 1 Desaus. Ch. (S. Car.) 542; but general pecuniary legatees cannot compel a specific devisee to contribute: Glass v. Dunn, 17 Ohio St. 413; and if the executor has funds sufficient to pay all legacies, but pays part only, and squanders the rest of the estate, the disappointed legatees have no right of action against those who have been paid: Sims v. Sims, 10 N. J. Eq. 158. So, though a specific legatee whose legacy is taken to pay a specialty debt may have contribution from a devisee of real estate, he may not, if the legacy is taken to pay a simple contract debt: Chase v. Lockerman, 11 Gill & J. (Md.) 185. But in all such cases, there must be some community of interest, and when a fraud contrived against several succeeds as to one only, he has no right to contribution against the others: Grubb v. Cottrell, 62 Pa. 23.

50. General Average—Particular Average.—When, in the course of a maritime adventure, a sacrifice, either of money or property, is rendered necessary for the sake of preventing the loss of everything embarked upon the adventure, that sacrifice is made good *pro tanto* by the *pro rata* contribution of all interests preserved thereby. This is what is known as general average. It rests upon the same broad principle of justice that underlies the other branches of the subject of contribution, and has nothing to do with any contractual relation between the parties, except in so far as they may alter their liability to contribute by contract: Pirie v. Middle Dock Co., 4 Asp. Cas. N. S. 388; McAndrews v. Thatcher, 3 Wall. 347; Slater v. Hayward Rubber Co., 26 Conn. 128; Nimick v. Holmes, 25 Pa. 366; but it is confined exclusively to maritime adventures: Ralli v. Troop, 157 U. S. 386, reversing 37 Fed. Rep. 888. It is distinguished from particular average in that it only applies to a burden incurred for the benefit of all interests involved in the adventure, while the latter applies to burdens which from the nature of the case are to be borne by only one or a part of those interests, such as the expense of ordinary repairs to the vessel: Coster v. Phoenix Ins. Co., 2 Wash. C. C. 51; Ross v. The Active, 2 Wash. C. C. 226; and a loss due to the negligence of the master of the ship, for which the ship alone is respon-

sible: *Phipps v. The Nicanor*, 44 Fed. Rep. 504; but see *Strang v. Scott*, 14 App. Cas. 601. So, when goods are taken from a sunken vessel and sent on to their destination, they alone must pay the expense of such transportation: *The L'Amerique*, 35 Fed. Rep. 835; *Hugg v. Baltimore & Cuba S. & M. Co.*, 35 Md. 414. The right to general average may be waived by express contract, but it is not abrogated by a statute exempting the owner of a vessel from liability for loss or damage to the cargo from fire happening on board the vessel without the negligence or design of the owner: *The Roanoke*, 59 Fed. Rep. 161, affirming 46 Fed. Rep. 297; nor by a bill of lading exempting ship and owner from liability for loss arising from any damage or accident incident to navigation or transportation, receipt, delivery, storage, or wharfage, any fire, collision, explosion of any kind, wetting, combustion, or heating: *Union Marine Ins. Co. v. The Roanoke*, 53 Fed. Rep. 270, affirmed 59 Fed. Rep. 161; although the loss was caused by pouring water into the hold to put out a fire.

51. Requisites of Claim for General Average.—"To constitute a general average loss, there must be a voluntary sacrifice of part of a maritime adventure, for the purpose, and with the effect, of saving the other parts of the adventure from an imminent peril impending over the whole.

"The interests so saved must be the sole object of the sacrifice, and those interests only can be required to contribute to the loss. The safety of property not included in the common adventure can neither be an object of the sacrifice, nor a ground of contribution.

"As the sacrifice must be for the benefit of the common adventure, and of that adventure only, so it must be made by some one specially charged with the control and the safety of that adventure, and not be caused by the compulsory act of others, whether private persons or public authorities:" *Ralli v. Troop*, 157 U. S. 386, 419. Accordingly,

(1) The act which occasions the loss must be necessary, in order to avoid an imminent loss of the whole adventure: *The Gratitude*, 3 Rob. Adm. 240; *The Queen*, 28 Fed. Rep. 755; and if it be unnecessary, though done in good faith: *The Santa*

Anna Maria, 49 Fed. Rep. 878; *Dabney v. N. E. Mut. Mar. Ins. Co.*, 14 Allen, (Mass.) 300; *Myers v. Baymore*, 10 Pa. 114; as the offering of rewards to the seamen to do their duty: *Harris v. Watson*, Peake's N. P. 72; *Frazer v. Hatton*, 2 C. B. N. S. 512; or if the proximate cause of the disaster might have been prevented by the exercise of reasonable care and skill: *Bentley v. Bustard*, 16 B. Mon. (Ky.) 643; see *infra*, §§ 54, 62; no claim for contribution arises. But the choice of the less of two perils is a necessary danger within this rule: *O'Connor v. Ocean Star*, 1 Holmes, (U. S.) 248; *The Watchful*, Browne, Adm. 469; *The Star of Hope*, 9 Wall. 203.

(2) It must be done in good faith; though this will be presumed if not controverted: *Lawrence v. Minturn*, 17 How. (U. S.) 100; *The Star of Hope*, 9 Wall. 203; *Patten v. Darling*, 1 Cliff. (U. S.) 254.

(3) It must be for the common benefit: *Johnson v. Chapman*, 35 L. J. C. P. 23; *The Mary*, 1 Sprague, (U. S.) 17; *The John Perkins*, 3 Ware, (U. S.) 89; *Barnard v. Adams*, 10 How. 270; *Delano v. Cargo of The Gallatin*, 1 Woods, (U. S.) 642; *Sonsmith v. The J. P. Donaldson*, 21 Fed. Rep. 671, reversing 19 Fed. Rep. 264. Any act which is for the benefit of one or more of those interests only, cannot create a right to contribution from the other interests not subserved by it: *Dobson v. Wilson*, 3 Camp. 480; *Western Assur. Co. v. Ontario Coal Co.*, 21 Can. S. C. R. 383; *The Joseph Farwell*, 31 Fed. Rep. 844; *Shoe v. Low Moor Iron Co.*, 49 Fed. Rep. 252, affirming 46 Fed. Rep. 125; *Whitteridge v. Norris*, 6 Mass. 125; *e. g.*, the hiring of extra hands in place of deserters: *Plummer v. Wildman*, 3 M. & S. 482. Goods jettisoned do not contribute for damages to the ship and cargo happening subsequent to the jettison: *Nelson v. Belmont*, 21 N. Y. 36, affirming 5 Duer, 310; and if the cargo of a stranded vessel is in no danger, the expense of removing it is not a general average charge against it: *Louisville Underwriters v. Pence*, 93 Ky. 96.

(4) It must be to avert a total loss of the whole: *Nesbitt v. Lushington*, 4 T. R. 783; *Harrison v. Bk. of Australasia*, 7 L. R. Exch. 39; *Columbian Ins. Co. v. Ashby*, 13 Pet. 331; *Barnard v. Adams*, 10 How. 270.

(5) The only alternative must be the loss of the whole ad-

venture : *Caze v. Reilly*, 3 Wash. C. C. 298 ; *Earnmoor S. S. Co. v. New Zealand Ins. Co.*, 73 Fed. Rep. 867.

(6) It must be the act of the master of the vessel, as a general rule, and be done out of the course of his ordinary duty : *The Nimrod*, 1 Ware, (U. S.) 9 ; though it may be the act of the crew, if necessary under the circumstances : *Price v. Noble*, 4 Taunt. 123 ; but the act of a stranger, *e. g.*, public authorities, will found no claim to general average : *Ralli v. Troop*, 157 U. S. 386, reversing 37 Fed. Rep. 888 ; *Wamsutta Mills v. Old Colony Steamboat Co.*, 137 Mass. 471.

(7) It must be intentional and deliberate : *Kemp v. Halliday*, 1 L. R. Q. B. 520 ; *Johnson v. Chapman*, 35 L. J. C. P. 23 ; *The Star of Hope*, 9 Wall. 203 ; *Lee v. Grinnell*, 5 Duer, (N. Y.) 400 ; *Walker v. U. S. Ins. Co.*, 11 S. & R. (Pa.) 61. Goods voluntarily surrendered to pirates will be a good basis of general average : *Hicks v. Palington*, Moore, K. B. 297 ; but not those forcibly taken : *Nesbitt v. Lushington*, 4 T. R. 783 ; or losses occasioned by the attacks of privateers : *Taylor v. Curtis*, 6 Taunt. 608 ; *Covington v. Roberts*, 2 B. & P. N. R. 378 ; *Power v. Whitmore*, 4 M. & S. 141. Property lost by a mere peril of the sea, without the agency of man : *Ross v. The Active*, 2 Wash. C. C. 226 ; such as goods damaged by water coming into the vessel through holes cut by the ice or rocks : *Fowler v. Rathbones*, 12 Wall. 102, affirming 6 Blatchf. 294 ; cannot claim contribution.

(8) It must be successful to the extent of saving some portion of the adventure ; for if there is nothing saved there can be nothing to contribute : *Columbian Ins. Co. v. Ashby*, 13 Pet. 331 ; *Williams v. Suffolk Ins. Co.*, 3 Sumn. (U. S.) 510 ; *Patten v. Darling*, 1 Cliff. (U. S.) 254 ; *McAndrews v. Thatcher*, 3 Wall. 347 ; *The Star of Hope*, 9 Wall. 203 ; *Lee v. Grinnell*, 5 Duer, (N. Y.) 400.

52. Consequential Damages.—General average is recoverable for all damages which are the proximate, though not the inevitable result of the act ; *e. g.*, for the damage caused by pouring water into the hold to extinguish a fire, though in one compartment only, if the safety of the ship and the rest of the cargo is endangered : *Whitecross Wire & Iron Co. v. Savill*, 8 Q. B. D. 653 ; *Gregory v. Orrall*, 8, Fed. Rep. 287 ; *Heye v. North Ger-*

man Lloyd, 36 Fed. Rep. 705, affirming 33 Fed. Rep. 60; The Roanoke, 59 Fed. Rep. 161, affirming 46 Fed. Rep. 297, which disapproved The Buckeye, 7 Biss. (U. S.) 23; Deming *v.* The Rapid Transit, 52 Fed. Rep. 320; Union Marine Ins. Co. *v.* The Roanoke, 53 Fed. Rep. 270, affirmed 59 Fed. Rep. 161; Nelson *v.* Belmont, 21 N. Y. 36, affirming 5 Duer, 310; Lee *v.* Grinnell, 5 Duer, (N. Y.) 400; Nimick *v.* Holmes, 25 Pa. 366; for damages occasioned to the cargo during necessary repairs, by handling or otherwise: The Mary, 1 Sprague, (U. S.) 17; Gregory *v.* Orrall, 8 Fed. Rep. 287; such as the melting of ice during a delay for repairs: Libby *v.* Gage, 14 Allen, (Mass.) 261; for the loss of articles during the discharge of the cargo: Hathaway *v.* Sun Ins. Co., 8 Bosw. (N. Y.) 33; and for the spoiling of the cargo by the influx of water into the hold through hatches or holes opened to permit the jettison of part of the cargo: Columbian Ins. Co. *v.* Ashby, 13 Pet. 331; or through a hole made by cutting away a mast: Maggrath *v.* Church, 1 Caines, (N. Y.) 196; Saltus *v.* Ocean Ins. Co., 14 Johns. (N. Y.) 138; though not for damages caused by the spread of smoke through the hold in consequence of an attempt to extinguish a fire by turning steam into the hold, if the damage done by the steam and the smoke cannot be distinguished: Reliance Marine Ins. Co. *v.* N. Y. & C. Mail S. S. Co., 77 Fed. Rep. 317, affirming 70 Fed. Rep. 262.

53. Jettison.—The jettison of a part of the cargo, for the purpose of saving the vessel and the remainder of the lading, has always been held a valid basis for a general average claim, except when goods carried on deck were jettisoned; the latter forming only a subject of particular average: Johnson *v.* Chapman, 19 C. B. N. S. 563; The Gratitude, 3 Rob. Adm. 240; Wright *v.* Marwood, 7 Q. B. D. 62; Lawrence *v.* Minturn, 17 How. 100; Dupont *v.* Vance, 19 How. 162; The Hettie Ellis, 22 Fed. Rep. 350, affirming 20 Fed. Rep. 393, 507; Barber *v.* Brace, 3 Conn. 9; Hampton *v.* Brig Thaddeus, 4 Mart. N. S. (La.) 582; Dodge *v.* Bartol, 5 Greenl. (Me.) 286; Cram *v.* Aiken, 13 Me. 229; Sproat *v.* Donnell, 26 Me. 185; Smith *v.* Wright, 1 Caines, (N. Y.) 43; Lenox *v.* United Ins. Co., 3 Johns. Cas. (N. Y.) 178; though they contributed to the jettison of under-deck cargo,

if they were saved thereby: *Dodge v. Bartol*, 5 Me. 286; *Cram v. Aiken*, 13 Me. 229; and were the subject of contribution among their respective owners: but owing to the changes in the construction of vessels and the custom of carrying certain freight on deck, this exception has been so far abrogated as to permit general average in case of the jettison of a deck-load carried in pursuance of a general custom: *Gould v. Oliver*, 4 Bing. N. C. 134; *Johnson v. Chapman*, 19 C. B. N. S. 563; *Milward v. Hibbert*, 3 Q. B. 120; *Hurley v. Milward*, 1 Jones & Cary, 224; *Burton v. English*, 12 Q. B. D. 218, reversing 10 Q. B. D. 426; *Strang v. Scott*, 14 App. Cas. 601; *The Marpessa*, [1891] P. 403; *Wood v. Phoenix Ins. Co.*, 1 Fed. Rep. 235; *Hazleton v. Manhattan Ins. Co.*, 12 Fed. Rep. 159; *Van Syckel v. Schooner Thomas Ewing*, 1 Crabbe, (U. S.) 405; *The Hettie Ellis*, 20 Fed. Rep. 507, affirming 20 Fed. Rep. 393; *The Dora*, 34 Fed. Rep. 343; *Gillett v. Ellis*, 11 Ill. 579; *Jones v. Bridge*, 2 Sweeny, (N. Y.) 431; *Harris v. Moody*, 30 N. Y. 266, affirming 4 Bosw. 210; *Meaher v. Lufkin*, 21 Tex. 383; *contra*, *Providence Washington Ins. Co. v. Bradley Fertilizer Co.*, 33 Fed. Rep. 685; or as far as the *vessel* is concerned, if it is so carried by virtue of the bill of lading, or other contract: *Johnson v. Chapman*, 19 C. B. N. S. 563; *The Watchful*, 1 Bro. Adm. 469; *The Schooner May & Eva*, 6 Fed. Rep. 628. The goods need not be lost by actual jettison. If they are taken out to lighten the ship and so save the rest, and put in boats or landed on shore, and are subsequently lost, their owner will be entitled to general average: *Hennen v. Monro*, 4 Mart. N. S. (La.) 449; *Lewis v. Williams*, 1 Hall, (N. Y.) 430. But if the jettison is not necessary: *The Santa Anna Maria*, 49 Fed. Rep. 878; or if the goods jettisoned have become valueless through spontaneous combustion, fermentation, inherent defects, or previous sea peril: *Johnson v. Chapman*, 19 C. B. N. S. 563; *Bond v. The Superb*, 1 Wall. Jr. C. C. 355; *The Adele Thackera*, 24 Fed. Rep. 809; they will not be a subject of general average, though the mere description of them in the bill of lading as perishable will not prevent a recovery: *Griswold v. Union Ins. Co.*, 3 Blatchf. (U. S.) 234; *Maggrath v. Church*, 1 Caines, (N. Y.) 196. And if the jettison is due to the unseaworthiness of the vessel at the time of sailing, her owners will be liable for the full value of the goods:

Lawrence v. Minturn, 17 How. 100; *Dupont v. Vance*, 19 How. 162. Goods jettisoned do not contribute for damage to the ship and remainder of the cargo occurring after the jettison: *Nelson v. Belmont*, 21 N. Y. 36, affirming 5 Duer, 310. No action will lie for contribution to jettison until after adjustment of the loss: *Commercial Union Ins. Co. v. Proceeds of the Allianca*, 64 Fed. Rep. 871. The preceding rules apply to the jettison of the ship's tackle and stores, as well as to the jettison of cargo: *Robinson v. Price*, 2 Q. B. D. 91; *Harrison v. Bk. of Australasia*, 7 L. R. Exch. 39; *Potter v. Providence Washington Ins. Co.*, 4 Mason, (U. S.) 298; *Patten v. Darling*, 1 Cliff. (U. S.) 254. Damage done as an incident to jettison, *e. g.*, by water coming in through hatches opened or through holes cut to make the jettison, is also a proper subject of general average: *Columbian Ins. Co. v. Ashby*, 13 Pet. 331.

54. Stranding.—When, in the exercise of a proper discretion, it is deemed best for all interests that the vessel be stranded, and this is accordingly done by the voluntary and intentional act of the master and crew, with the result of saving all or part of the cargo, that which is saved must contribute to the loss of both vessel and cargo, even though the ship be wholly lost: *Hendricks v. Australasian Ins. Co.*, 9 L. R. C. P. 460; *Columbian Ins. Co. v. Ashby*, 13 Pet. (U. S.) 331; *Caze v. Reilly*, 3 Wash. C. C. 298; *Barnard v. Adams*, 10 How. (U. S.) 270; *Patten v. Darling*, 1 Cliff. (U. S.) 254; *McAndrews v. Thatcher*, 3 Wall. 347; *The Star of Hope*, 9 Wall. 203; *Eight Hundred Bales of Cotton*, 8 Blatchf. (U. S.) 221; *Sims v. Gurney*, 4 Binn. (Pa.) 513; *Gray v. Waln*, 2 S. & R. (Pa.) 229; but if the stranding be due to an unjustifiable deviation or negligent act of the master, the loss will be attributed to that rather than to peril of the sea: *O'Connor v. The Ocean Star*, 1 Holmes, (U. S.) 248; *The Portsmouth*, 9 Wall. 682; *Snow v. Perkins*, 39 Fed. Rep. 334; *Phipps v. The Nicanor*, 44 Fed. Rep. 504. Shipping the cable with intent to go ashore is sufficient to make the stranding voluntary: *Sturgess v. Cary*, 2 Curt. (U. S.) 59; *Walker v. U. S. Ins. Co.*, 11 S. & R. (Pa.) 61; and so is a mere direction to a part of the shore where the vessel could lie more safely, if she is lost as a result thereof: *Patten v. Darling*, 1

Cliff. (U. S.) 254. So, when a ship and cargo are exposed to a common peril of sinking and becoming submerged in deep water, and the expense of raising and saving them from that place would be greater than if stranded in shoal water, and the master, to save them from increased expenses, runs the ship on flats near by, and strands her in shoal water, thereby increasing the peril to the ship and diminishing the damage and expense of saving her and the cargo, the stranding is voluntary, and the owner of the vessel is entitled to general average: *Fowler v. Rathbones*, 12 Wall. 102, affirming 6 Blatchf. (U. S.) 294; and the same is true when a flooded ship is stranded to steady her and keep her from pounding on the rocks: *Pacific Mail S. S. Co. v. Dupre*, 74 Fed. Rep. 250. After the intent to strand is formed an accidental striking on a rock during the act of stranding will not render the loss involuntary: *Rea v. Cutler*, 1 Sprague, (U. S.) 135, reversed on another point, 7 How. 729; *Sims v. Gurney*, 4 Binn. (Pa.) 513; *Walker v. U. S. Ins. Co.*, 11 S. & R. (Pa.) 61. If, however, the vessel is run ashore when there is no chance of saving her, the stranding is not voluntary, and there can be no general average as to her: *Shoe v. Low Moor Iron Co.*, 49 Fed. Rep. 252, affirming 46 Fed. Rep. 125; *Meech v. Robinson*, 4 Whart. (Pa.) 360; though there should be contribution among the owners of the cargo, if any of it is saved as a result of the stranding.

55. Scuttling.—The right to general average upon the scuttling of a ship to put out a fire in the hold, is governed by the same rules as apply to the case of stranding. If necessary, and done by order of the master, it will charge the part of the cargo saved: *Reliance Marine Ins. Co. v. N. Y. & C. Mail S. S. Co.*, 70 Fed. Rep. 262; and the same will hold good if it is done by the public authorities at the request of the master. But if it be done by them on their own responsibility, even though it be deemed necessary to save the dock, or other vessels lying thereat, it will give no right to contribution, for it is the act of a stranger: *Wamsutta Mills v. Old Colony Steamboat Co.*, 137 Mass. 471. The principles which apply to such a case are very clearly laid down in *Ralli v. Troop*, 157 U. S. 386, reversing 37 Fed. Rep. 888, as follows :

“The sacrifice, whether of ship or cargo, must be by the will and act of its owner, or of the master of the ship, or other person charged with the control and protection of the common adventure, and representing and acting for all the interests included in that adventure, and those interests only.

“A sacrifice of vessel or cargo by the act of a stranger to the adventure, although authorized by the municipal law to make the sacrifice for the protection of his own interests, or of those of the public, gives no right of contribution, either for or against those outside interests, or even as between the parties to the common adventure.

“The port authorities are strangers to the maritime adventure and to all the interests included therein. They are in no sense the agents or representatives of the parties to that adventure, either by reason of any implied contract between those parties, or of any power conferred by law over the adventure as such.

“They have no special authority or special duty in regard to the preservation, or the destruction of any vessel and her cargo, as distinct from the general authority and the general duty appertaining to them as guardians of the port, and of all the property, on land and water, within their jurisdiction.

“Their right and duty to preserve or destroy property, as necessity may demand, to prevent the spreading of a fire, is derived from the municipal law, and not from the law of the sea.

“Their sole office and paramount duty, and, it must be presumed, their motive and purpose, in destroying ship or cargo, in order to put out a fire, are not to save the rest of a single maritime adventure, or to benefit private individuals engaged in that adventure; but to protect and preserve all the shipping and property in the port for the benefit of the public.

“In the execution of this office, and in the performance of this duty, they act under their official responsibility to the public, and are not subject to be controlled by the owners of the adventure, or by the master of the vessel as their representative.”

56. Expenditures on Behalf of the Common Adventure.—
An expenditure made for the benefit of both ship and cargo,

under circumstances of extraordinary danger to both, will form a basis for general average: *Kemp v. Halliday*, 1 L. R. Q. B. 520; *Ocean S. S. Co. v. Anderson*, 13 Q. B. D. 651, reversed on another point, 10 App. Cas. 107; *McAndrews v. Thatcher*, 3 Wall. 347; *Wellman v. Morse*, 76 Fed. Rep. 573; *Wheeler v. Continental Ins. Co.*, 9 N. Y. Suppl. 142; whether it be incurred by invoking the aid of private citizens or of the public authorities: *Rose v. Bk. of Australasia*, [1894] A. C. 687; *Gage v. Libby*, 14 Allen, (Mass.) 261. Such are expenses incurred in enabling a vessel which has been accidentally stranded to complete her voyage, *e. g.*, lighterage, hire of extra hands, etc.: *McAndrews v. Thatcher*, 3 Wall. 347; *Bedford Ins. Co. v. Parker*, 2 Pick. (Mass.) 1; the expense of detention occasioned by capture, and necessary costs incurred in order to obtain release: *Leavenworth v. Delafield*, 1 Caines, (N. Y.) 573; *Speyer v. N. Y. Ins. Co.*, 3 Johns. (N. Y.) 88; *Jumel v. Mar. Ins. Co.*, 7 Johns. (N. Y.) 412; *Kingston v. Girard*, 4 Dall. (Pa.) 274; and ransom paid in good faith: *Maisonair v. Keating*, 2 Gall. (U. S.) 325; *Douglas v. Moody*, 9 Mass. 548; *Sansom v. Ball*, 4 Dall. (Pa.) 459; the delay and expense incurred in consequence of a deviation, which is necessary, in the judgment of the master, to preserve the vessel and cargo, but not that due simply to contrary winds: *Soule v. Rodocanachi*, Newb. Adm. (U. S.) 504; *The Sarah*, 2 Sprague, (U. S.) 31; *Lawrence v. Minturn*, 17 How. 100; nor that due to an entire abandonment of the voyage: *Sparks v. Kittredge*, 9 Law Rep. 318; *The Ann D. Richardson*, 1 Abb. Adm. (U. S.) 499; expenses incurred in bearing up for a port of distress, after meeting with a disaster; *e. g.*, wages and provisions of master and crew, and like expenses incurred during detention: *Columbian Ins. Co. v. Ashby*, 13 Pet. 331; *Potter v. Ocean Ins. Co.*, 3 Sumn. (U. S.) 27; *Pope v. Nickerson*, 3 Story, (U. S.) 465; *The Star of Hope*, 9 Wall. 203; *Hobson v. Lord*, 92 U. S. 397; *Grace v. The Mauna Loa*, 76 Fed. Rep. 829; including the charge of entering the harbor: *Vowell v. Columbian Ins. Co.*, 3 Cr. C. C. 83; towing into port, though the port of refuge and that of destination are the same: *The Star of Hope*, 9 Wall. 203; *Sweeney v. Thompson*, 39 Fed. Rep. 121; quarantine dues: *Hathaway v. Sun Ins. Co.*, 8 Bosw. (N. Y.) 33; the surveyor's bill, port charges, docking and unloading

for repairs : *Atwood v. Sellar*, 5 Q. B. D. 286, affirming 4 Q. B. D. 342; *Rose v. Bk. of Australasia*, [1894] A. C. 687; extra expense incurred in keeping the vessel afloat : *Hobson v. Lord*, 92 U. S. 397; such as the hiring of extra hands to pump : *Birkley v. Presgrave*, 1 East, 220; *Orrok v. Commonwealth Ins. Co.*, 21 Pick. (Mass.) 456; and the hire of all necessary apparatus, and warehousing and reloading after the repairs are completed : *Potter v. Ocean Ins. Co.*, 3 Sumn. (U. S.) 27; *The Mary*, 1 Sprague, (U. S.) 17; *The Star of Hope*, 9 Wall. 203. When a vessel, disabled at sea, puts into a port of refuge for repairs, the ordinary expenses incurred, including pilotage, towage, quarantine dues, docking, wharfage, surveys on the ship and cargo, cost of unloading, storing and reloading cargo, and an allowance for wages of the crew, and provisions from the moment of departure from the course of the voyage until its renewal, or so long as its renewal remains in expectancy, are chargeable to general average : *The Joseph Farwell*, 31 Fed. Rep. 844. Money raised abroad for necessary expenses which are a proper subject of general average is also a ground for contribution : *The Fortitude*, 3 Sumn. (U. S.) 228; *The Star of Hope*, 9 Wall. 203; but see *The Julia Blake*, 107 U. S. 418.

57. Particular Average Expenditures.—On the other hand, repairs from which the cargo derives no benefit, and which are not done for its safety, such as ordinary repairs, due to the natural decay and wear and tear of the ship : *Ross v. The Active*, 2 Wash. C. C. 226; *Van den Toorn v. Leeming*, 70 Fed. Rep. 251; *Sparks v. Kittredge*, 9 Law Rep. 318; *Bedford Ins. Co. v. Parker*, 2 Pick. (Mass.) 1; or even extra expenses due to causes which are not a source of peril to the cargo, such as bad weather, and detention in quarantine under ordinary circumstances, or by embargo : *Da Costa v. Newnham*, 2 T. R. 407; *Wilson v. Bk. of Victoria*, 2 L. R. Q. B. 203; *The Nathaniel Hooper*, 3 Sumn. (U. S.) 542; *McBride v. Marine Ins. Co.*, 7 Johns. (N. Y.) 431; services incurred to save freight : *Schuster v. Fletcher*, 3 Q. B. D. 418; or the expense of getting off a stranded ship, when the cargo is in no danger : *The Alcona*, 9 Fed. Rep. 172; and *a fortiori* expenses due to causes which would make the ship-owner liable for failure to perform his contract of carriage : *e. g.*, the expense

of freeing the master from arrest for his individual debt: *Dobson v. Wilson*, 3 Camp. 480; or of freeing the vessel from attachment in a suit against the owners, create no right to general average. So, no part of the expense incurred for the welfare of the ship alone, after the common enterprise has been ended by the landing of the cargo without any intention of continuing the adventure, should be borne by the cargo: *Walthew v. Mavrojani*, 5 L. R. Exch. 116; *Royal Mail Steam Packet Co. v. English Bank of Rio de Janeiro*, 19 Q. B. D. 362. Similarly, costs and expenses incident to repairs to the vessel, incurred in expectation of continuing the voyage, will not be chargeable to general average, if the voyage is subsequently abandoned: *The Joseph Farwell*, 31 Fed. Rep. 844; nor will the expenses of delay at the termination of the adventure: *Dunham v. Commercial Ins. Co.*, 11 Johns. (N. Y.) 315. Similarly, the cost of sending cargo forward to its destination by other means of transportation must be borne by it alone: *The L'Amerique*, 35 Fed. Rep. 835; *Hugg v. Baltimore & Cuba S. & M. Co.*, 35 Md. 414.

58. Use of Ship's Stores.—If any part of the ship or her stores is used for purposes out of the ordinary course, *e. g.*, when spare spars, etc., are used for fuel, because the ordinary supply has been exhausted by the unusual duration of the voyage, due to bad weather: *Birkley v. Presgrave*, 1 East, 220; *Harrison v. Bank of Australasia*, 7 L. R. Exch. 39; *The Bona*, [1895] P. 125; or if any stores or parts of the ship are jettisoned or cut away to save the vessel: *Robinson v. Price*, 2 Q. B. D. 91, 295; *Shepherd v. Kottgen*, 2 C. P. D. 578; *Potter v. Providence Washington Ins. Co.*, 4 Mason, (U. S.) 298; *Patten v. Darling*, 1 Cliff. (U. S.) 254; *The Margarethe Blanca*, 12 Fed. Rep. 728; but see *Svensen v. Wallace*, 10 App. Cas. 404, affirming 13 Q. B. D. 69, which reversed 11 Q. B. D. 616; the ship is entitled to contribution. But if she did not take on her usual supplies of fuel at starting, the use of spare timbers and stores is particular average up to the time that her usual supplies would have lasted, and general average only after that: *Hurlbut v. Turnure*, 76 Fed. Rep. 587.

59. Salvage.—Claims for salvage incurred for the benefit of both vessel and cargo, whether paid voluntarily or under decree of

court, are the subject of general average : *Kemp v. Halliday*, 34 L. J. Q. B. 233, affirmed 1 L. R. Q. B. 520 ; *Sansom v. Ball*, 4 Dall. 459 ; *Peters v. Warren Ins. Co.*, 1 Story, (U. S.) 463 ; *Van Syckel v. The Thomas Ewing, Crabbe*, (U. S.) 405 ; *Houseman v. Cargo of Schooner North Carolina*, 15 Pet. 40 ; *The Antelope*, 1 Low. (U. S.) 130 ; *Williams v. Suffolk Ins. Co.*, 3 Sumn. (U. S.) 270 ; *The Congress*, 1 Biss. (U. S.) 42 ; *Morse v. Pomroy Coal Co.*, 75 Fed. Rep. 428 ; *Heyliger v. N. Y. Firemen Ins. Co.*, 11 Johns. (N. Y.) 85 ; *Hathaway v. Sun Ins. Co.*, 8 Bosw. (N. Y.) 33 ; though when the payment is voluntary, the contributors are not bound by its amount : *Anderson v. The Ocean S. S. Co.*, 10 App. Cas. 107, reversing 13 Q. B. D. 651 ; and when there is no common peril, each interest bears the cost of its own salvage only : *Western Assur. Co. v. Ontario Coal Co.*, 21 Can. S. C. R. 383. After the cargo has been discharged and put in a place of safety, subsequent salvage expenses incurred on behalf of the ship alone will not form a subject of general average : *Job v. Langton*, 6 El. & Bl. 779 ; *Walthew v. Mavrojani*, 5 L. R. Exch. 116 ; unless it continues under the control of the master, so that it may be again shipped for the purpose of continuing the voyage : *McAndrews v. Thatcher*, 3 Wall. 347 ; *Nelson v. Belmont*, 21 N. Y. 36, affirming 5 Duer, 310 ; see *infra*, § 60.

60. Expenses Incurred after Separation of Interests.—After the respective interests are finally separated, the expenses incurred in behalf of one are no charge against the other : *Nelson v. Belmont*, 21 N. Y. 36, affirming 5 Duer, 310 ; but it is by no means settled when the community of interest ceases. Some authorities hold that it ceases the moment the cargo is put in a place of safety, with no intention of reloading it on the vessel : *Job v. Langton*, 6 El. & Bl. 779 ; *Walthew v. Mavrojani*, 5 L. R. Exch. 116 ; *Royal Mail Steam Packet Co. v. English Bank of Rio de Janeiro*, 19 Q. B. D. 362 ; *McAndrews v. Thatcher*, 3 Wall. 347 ; *Insurance Co. v. Parker*, 2 Pick. (Mass.) 1 ; others, that it continues until both vessel and cargo are put in a place of safety : *Nelson v. Belmont*, 21 N. Y. 36, affirming 5 Duer, 310 ; *Wheeler v. Continental Ins. Co.*, 9 N. Y. Suppl. 142 ; *Bevan v. Bk. of U. S.*, 4 Whart. (Pa.) 301. Thus, on the one hand, in *The L'Amerique*, 35 Fed. Rep. 835, where a stranded

vessel could not be got off without great expense and delay, and the cargo was unloaded for the benefit of both ship and cargo, without any attempt to reload it in the same vessel, and was sent to its destination and delivered to the consignees, it was held that the community of interest ceased with the unloading, and that the subsequent expense of floating the vessel was not a general average charge against the cargo; but, on the other hand, where, before a vessel was scuttled, the master took out certain goods and sent them to their destination by another vessel, and the vessel and cargo were afterwards saved, it was held that the acts were continuous and inseparable, and that the goods sent on were liable to general average: *Reliance Marine Ins. Co. v. N. Y. & C. Mail S. S. Co.*, 77 Fed. Rep. 317, affirming 70 Fed. Rep. 262; and where a cargo was saved by wreckers in different lots, and taken to a place of safety and stored, it was held that the salvage services were continuous, and that all the goods saved must contribute, though part of the services were performed after part of the goods had been stored in safety: *Coast Wrecking Company v. Phoenix Ins. Co.*, 7 Fed. Rep. 236. When the interests are temporarily separated, as by unloading and storing the cargo in order to repair the vessel, and it is expected to reload the cargo, and complete the voyage, then, even though by reason of unforeseen circumstances, as the inability to repair the vessel and make her seaworthy again, this expectation is not realized, the entire expenses of saving and protecting the different interests, until the hope of reuniting them is abandoned, are chargeable to general average: *The Joseph Farwell*, 31 Fed. Rep. 844.

61. What Goods Contribute.—All goods put on board for the purposes of transportation must contribute to general average if saved, provided they were exposed to the common peril; but not articles attached to the persons of passengers, or used by them for wearing or toilet purposes during the voyage: *Hill v. Patten*, 8 East, 373; *Brown v. Stapleton*, 4 Bing. 119; *Columbian Ins. Co. v. Ashby*, 13 Pet. 331; *McAndrews v. Thatcher*, 3 Wall. 347; *Mutual Safety Ins. Co. v. Ship George*, Olcott's Adm. 157. The rule applies to government property: *United States v. Ames*, 1 Woodb. & M. (U. S.) 76; *United States v. Wilder*, 3 Sumn.

(U. S.) 308; *The Davis*, 10 Wall. 15; to bank bills and specie, though not to bills of exchange and drafts: *The Emblem*, 2 Ware, (U. S.) 68; *Pacific Mail S. S. Co. v. N. Y. H. & R. Min. Co.*, 69 Fed. Rep. 414, reversed on another point, 74 Fed. Rep. 564; see *supra*, p. 138; *Nelson v. Belmont*, 21 N. Y. 36, affirming 5 Duer, 310; *Harris v. Moody*, 30 N. Y. 266, affirming 4 Bosw. 210; *Bevan v. Bank of U. S.*, 4 Whart. (Pa.) 301; and to wearing apparel and other personal effects, if carried as cargo or deposited with the master: *Columbian Ins. Co. v. Ashby*, 13 Pet. 331; *McAndrews v. Thatcher*, 3 Wall. 347; *Heye v. North German Lloyd*, 36 Fed. Rep. 705, affirming 33 Fed. Rep. 60; but provisions for the use of the crew and passengers do not contribute: *Brown v. Stapleton*, 4 Bing. 119; nor human life: *The Emblem*, 2 Ware, (U. S.) 68; nor goods lost: *Simonds v. White*, 2 B. & C. 805; *Scudder v. Bradford*, 14 Pick. (Mass.) 13.

62. Losses due to Negligence of Owner, or Inherent Vice of Cargo.—If the disaster and loss were due to the fault of the owner of the property destroyed, he has no claim against others for general average: *Johnson v. Chapman*, 19 C. B. N. S. 563; *The Mary*, 1 Sprague, (U. S.) 17; and therefore if the loss was due to the negligence of the master, or the unseaworthiness of the ship at the time of leaving port: *Wilson v. Cross*, 33 Cal. 60; *Broadnax v. Cheraw & S. R. R. Co.*, 157 Pa. 140; its owners have no right to contribution from the cargo; but seaworthiness will be presumed in the absence of proof to the contrary: *Sweeney v. Thompson*, 39 Fed. Rep. 121; *Van den Toorn v. Leeming*, 70 Fed. Rep. 251; *Franklin Sugar Refining Co. v. Funch*, 73 Fed. Rep. 844; *Myers v. Girard Ins. Co.*, 26 Pa. 192; though when the evidence shows that the vessel sprung a leak under circumstances in which a like accident would not have ordinarily happened to a seaworthy vessel, the presumption is the other way, and the burden of proof of seaworthiness is cast upon the owners: *Broadnax v. Cheraw & S. R. R. Co.*, 157 Pa. 140. The negligence of the master, however, will not prevent contribution between owners of cargo: *Strang v. Scott*, 14 App. Cas. 601; *The Carron Park*, 15 P. D. 203. If the thing destroyed was affected by an inherent vice, which would have inevitably destroyed it, and *a fortiori* if it had been already rendered value-

less, its destruction cannot found a claim for general average: *Johnson v. Chapman*, 19 C. B. N. S. 563; *Shepherd v. Kottgen*, 2 C. P. D. 585; *Bond v. The Superb*, 1 Wall Jr. C. C. 355; *The Adele Thackera*, 24 Fed. Rep. 809; *Nickerson v. Tyson*, 8 Mass. 467. So, if it would have inevitably been destroyed in any case, its destruction will not give a right to demand contribution: *Crockett v. Dodge*, 12 Me. 190; but it has been held that if its destruction contributed to the saving of any other property, it should be entitled to contribution against that: *Sonsmith v. The J. P. Donaldson*, 21 Fed. Rep. 671, reversing 19 Fed. Rep. 264. This seems the more equitable rule.

63. Adjustment of General Average.—When a loss has occurred which founds a claim for general average, it must be adjusted before a suit will lie to enforce the claim. As a general rule, the port of destination is the proper place for adjustment, though circumstances may make the port of distress the proper place: *Barnard v. Adams*, 10 How. 270; *Olivari v. Thames & Mersey Marine Ins. Co.*, 37 Fed. Rep. 894; and the final separation of vessel and cargo is such a circumstance: *McLoon v. Cummings*, 73 Pa. 98; but a mere temporary suspension of the voyage will not warrant an adjustment at an intermediate port: *Hill v. Wilson*, 4 C. P. D. 329. When made, the adjustment binds all parties, although it might have been made differently in the home port: *Peters v. Warren Ins. Co.*, 3 Sumn. (U. S.) 389; *Loring v. Neptune Ins. Co.*, 20 Pick. (Mass.) 411; *Strong v. N. Y. Firemen Ins. Co.*, 11 Johns. (N. Y.) 323; and although it differs from the customary adjustment, if made in pursuance of a contract of insurance entered into within the jurisdiction: *Minor v. Commercial Union Assur. Co.*, 58 Fed. Rep. 801; but it is not of the same force and effect as an award of arbitrators: *The Alpin*, 23 Fed. Rep. 815.

64. Estimation of Values on Adjustment.—In making the adjustment, the value of all the interests must be estimated, both that which is destroyed and that which is saved. The value of the ship should be estimated at her value at the time of the disaster, which is usually taken to be her value at the port of departure, less one-third for the wear and tear of the

voyage; but this rule is liable to exceptions, especially in case of a total loss: *Humphreys v. Union Ins. Co.*, 3 Mason, (U. S.) 429; *Mutual Safety Ins. Co. v. The Cargo of the Ship George*, Olcott's Adm. 157; *Wallace v. Thames & Mersey Ins. Co.*, 22 Fed. Rep. 66; *Gray v. Waln*, 2 S. & R. (Pa.) 229. Her value after the disaster is estimated by the price fetched, if she is sold, otherwise by simple appraisement: *Mutual Safety Ins. Co. v. The Cargo of the Ship George*, Olcott's Adm. 157; *Bell v. Smith*, 2 Johns. (N. Y.) 98. But the insurance money is not part of the interest of the owners in the ship, and should not be added to the value of what is saved, in order to increase the fund for distribution: *The City of Norwich*, 118 U. S. 468; *The Scotland*, 118 U. S. 507; *The Great Western*, 118 U. S. 520; *Deming v. The Rapid Transit*, 52 Fed. Rep. 320. The proper measure of the value of the goods, both those saved and those sacrificed, is their value at the port of discharge, less freight: *The Nathaniel Hooper*, 3 Sumn. (U. S.) 542; *Tudor v. Macomber*, 14 Pick. (Mass.) 34; but if the goods saved are reshipped to the port of destination: *Barnard v. Adams*, 10 How. (U. S.) 270; or taken to another port and sold, when there is no sale for them at the port of destination: *Wheaton v. China Mut. Ins. Co.*, 39 Fed. Rep. 879; they should be valued there. In the case of expenditures, they should be valued as of the time when the expenditures were made: *Douglas v. Moody*, 9 Mass. 548. If the freight is included in the adjustment of the value of the goods lost, the ship is entitled to recover it: *Gibson v. Brown*, 44 Fed. Rep. 98; and it is estimated at the amount actually earned up to the time of breaking up the voyage, less expenses incurred to save it: *The Mary*, 1 Sprague, (U. S.) 17; *Brown v. Lull*, 2 Sumn. (U. S.) 443; *Columbian Ins. Co. v. Ashby*, 13 Pet. 331; *Maggrath v. Church*, 1 Caines, (N. Y.) 196. In the case of a captured vessel, the freight is reckoned up to the day of capture: *Leavenworth v. Delafield*, 1 Caines, (N. Y.) 573.

65. General Average Lien.—The liability to contribute to general average constitutes a lien on the property saved in favor of every one who has suffered loss by the disaster; it stands on the same footing as the lien for transportation: *Dupont v.*

Vance, 19 How. 162; Wellman v. Morse, 76 Fed. Rep. 573; and the master may retain the goods until the claim is satisfied, not only on behalf of the owners of the vessel, but on behalf of every one entitled to contribution, being their agent for this purpose: Scaife v. Tobin, 3 B. & Ad. 523; Strang v. Scott, 14 App. Cas. 601; U. S. v. Wilder, 3 Sumn. (U. S.) 308; The Morning Mail, 17 Fed. Rep. 545; Strong v. N. Y. Firemen Ins. Co., 11 Johns. (N. Y.) 323; and may sell the goods if the claim be not paid: Dupont v. Vance, 19 How. 162; Strong v. N. Y. Firemen Ins. Co., 11 Johns. (N. Y.) 323. The lien is determined by an unconditional delivery of the goods to the consignee or owner: Cutler v. Rae, 7 How. 729, reversing 1 Sprague, (U. S.) 135; Dike v. The St. Joseph, 6 McLean, (U. S.) 573; Heye v. North German Lloyd, 36 Fed. Rep. 705, affirming 33 Fed. Rep. 60; and the acceptance thereof by the consignee will not make him personally liable: Scaife v. Tobin, 3 B. & Ad. 523; but it may be preserved by a conditional or qualified delivery: Wellman v. Morse, 76 Fed. Rep. 573; and it is accordingly the usual practice to take a bond conditioned for the payment of the general average. Such a bond is binding upon the parties in the absence of fraud or mistake: Peters v. Warren Ins. Co., 3 Sumn. (U. S.) 389; Fowler v. Rathbones, 12 Wall. 102, affirming 6 Blatchf. 294; The John M. Chambers, 24 Fed. Rep. 383; The L'Amérique, 35 Fed. Rep. 835; Loring v. Neptune Ins. Co., 20 Pick. (Mass.) 411; except when there is no liability, in which case it is void: Bowring v. Thebaud, 56 Fed. Rep. 520.

66. Recovery of General Average.—The claim for general average may be enforced by a proceeding *in rem* in the admiralty courts: Mutual Safety Ins. Co. v. The Cargo of the Ship George, Olcott's Adm. 96; U. S. v. Wilder, 3 Sumn. (U. S.) 308; The Packet, 3 Mason, (U. S.) 255; Potter v. Providence Washington Ins. Co., 4 Mason, (U. S.) 298; Dupont v. Vance, 19 How. 162; by a suit in equity or at law for contribution: Price v. Noble, 4 Taunt. 123; Birkley v. Presgrave, 1 East, 220; Anderson v. Ocean Steamship Co., 10 App. Cas. 107, reversing, on another point, 13 Q. B. D. 651; Strang v. Scott, 14 App. Cas. 601; Dupont v. Vance, 19 How. 162; Heye v. North German Lloyd, 33 Fed. Rep. 60; affirmed on another point, 36 Fed. Rep.

705; or by a suit upon the bond given to secure the payment of the general average: *Gloucester Ins. Co. v. Younger*, 2 Curt. (U. S.) 322; *Coast Wrecking Co. v. Phoenix Ins. Co.*, 7 Fed. Rep. 236; but no suit will lie in any court until the claim has been adjusted: *Commercial Union Ins. Co. v. Proceeds of the Allianca*, 64 Fed. Rep. 871. The ship-owner may recover his full loss in an action on an insurance policy, without any question as to remedy over to others: *Potter v. Providence Washington Ins. Co.*, 4 Mason, (U. S.) 298; *Dupont v. Vance*, 19 How. 162; *Watson v. Marine Ins. Co.*, 7 Johns. (N. Y.) 57; but if he also owns the cargo the amount due thereon may be deducted by the underwriter from the loss on the ship: *Potter v. Providence Washington Ins. Co.*, 4 Mason, (U. S.) 298.

Corporations—Private Corporations—One-man Company—Limited Liability—Fraud upon Creditors—Dissolution.

SALOMON v. SALOMON & CO., LTD.

(House of Lords. November 16, 1896.)

([1897] A. C. 22; reversing [1895] 2 Ch. 323.)

It is not contrary to the true intent and meaning of the Companies Act, 1862, for a trader, in order to limit his liability and obtain the preference of a debenture-holder over other creditors, to sell his business to a limited company, consisting only of himself and six members of his own family, the business being then solvent, all the terms of sale being known to and approved by the shareholders, and all the requirements of the act being complied with.

A trader sold a solvent business to a limited company with a nominal capital of forty thousand shares of £1 each, the company consisting only of the vendor, his wife, a daughter and four sons, who subscribed for one share each, all the terms of sale being known to and approved by the shareholders. In part payment of the purchase money debentures forming a floating security were issued to the vendor. Twenty thousand shares were also issued to him and were paid for out of the purchase money. These shares gave the vendor the power of outvoting the six

other shareholders. No shares other than these twenty thousand and seven were ever issued. All the requirements of the Companies Act, 1862, were complied with. The vendor was appointed managing director, bad times came, the company was wound up, and after satisfying the debentures there was not enough to pay the ordinary creditors.

Held, that the proceedings were not contrary to the intent and meaning of the Companies Act, 1862 ; that the company was duly formed and registered and was not the mere alias or agent of or trustee for the vendor ; that he was not liable to indemnify the company against the creditors' claims ; that there was no fraud upon creditors or shareholders ; and that the company (or the liquidator suing in the name of the company,) was not entitled to rescission of the contract for purchase.

The decisions of VAUGHAN WILLIAMS, J., and the court of appeal, [1895] 2 Ch. 323, reversed.

The following statement of the facts material to this report is taken from the judgment of Lord WATSON :

The appellant, Aron Salomon, for many years carried on business, on his own account, as a leather merchant and wholesale boot manufacturer. With the design of transferring his business to a joint stock company, which was to consist exclusively of himself and members of his own family, he, on July 20, 1892, entered into a preliminary agreement with one Adolph Anholt, as trustee for the future company, settling the terms upon which the transfer was to be made by him, one of its conditions being that part payment might be made to him in debentures of the company. A memorandum of association was then executed by the appellant, his wife, a daughter, and four sons, each of them subscribing for one share, in which the leading object for which the company was formed was stated to be the adoption and carrying into effect, with such modifications (if any,) as might be agreed on, of the provisional agreement of July 20. The memorandum was registered on July 28, 1892 ; and the effect of registration, if otherwise valid, was to incorporate the company, under the name of "Aron Salomon and Company, Limited," with liability limited by shares, and having a nominal capital of £40,000, divided

into forty thousand shares of £1 each. The company adopted the agreement of July 20, subject to certain modifications which are not material; and an agreement to that effect was executed between them and the appellant on August 2, 1892. Within a month or two after that date the whole stipulations of the agreement were fulfilled by both parties. In terms thereof, one hundred debentures, for £100 each, were issued to the appellant, who, upon the security of these documents, obtained an advance of £5,000 from Edmund Broderip. In February, 1893, the original debentures were returned to the company and cancelled; and in lieu thereof, with the consent of the appellant as beneficial owner, fresh debentures to the same amount were issued to Mr. Broderip, in order to secure the repayment of his loan, with interest at eight per cent.

In September, 1892, the appellant applied for and obtained an allotment of twenty thousand shares; and from that date until an order was made for its compulsory liquidation, the share register of the company remained unaltered, twenty thousand and one shares being held by the appellant, and six shares by his wife and family. It was all along the intention of these persons to retain the business in their own hands, and not to permit any outsider to acquire an interest in it.

Default having been made in the payment of interest upon his debentures, Mr. Broderip, in September, 1893, instituted an action in order to enforce his security against the assets of the company. Thereafter a liquidation order was made, and a liquidator appointed at the instance of the unsecured creditors of the company. It has now been ascertained that, if the amount realized from the assets of the company were, in the first place, applied in extinction of Mr. Broderip's debt and interest, there would remain a balance of about £1,055, which is claimed by the appellant as beneficial owner of the debentures. In the event of his claim being sustained there will be no funds left for pay-

ment of the unsecured creditors, whose debts amount to £7,733 8s. 3d.

The liquidator lodged a defence, in the name of the company, to the debenture suit, in which he counter-claimed against the appellant, (who was made a party to the counter-claim,) (1) to have the agreements of July 20 and August 2, 1892, rescinded, (2) to have the debentures already mentioned delivered up and cancelled, (3) judgment against the appellant for all sums paid by the company to the appellant under these agreements, and (4) a lien for these sums upon the business and assets. The averments made in support of these claims were to the effect that the price paid by the company exceeded the real value of the business and assets by upwards of £8,200; that the arrangements by the appellant for the formation of the company were a fraud upon the creditors of the company; that no board of directors of the company was ever appointed, and that in any case such board consisted entirely of the appellant, and there never was an independent board. The action came on for trial on the counter-claim before VAUGHAN WILLIAMS, J., when the liquidator was examined as a witness on behalf of the company, whilst evidence was given for the appellant by himself, and by his son, Emanuel Salomon, one of the members of the company, who had been employed in the business for nearly twenty years.

The evidence shows that before its transfer to the new company the business had been prosperous, and had yielded to the appellant annual profits sufficient to maintain himself and his family, and to add to his capital. It also shows that at the date of transfer the business was perfectly solvent. The liquidator, whose testimony was chiefly directed towards proving that the price paid by the company was excessive, admitted on cross-examination that the business, when transferred to the company, was in a sound condition, and that there was a substantial surplus. No evidence was led tending to support the allegation that no board of direc-

tors was ever appointed, or that the board consisted entirely of the appellant. The non-success and ultimate insolvency of the business, after it came into the hands of the company, was attributed by the witness, Emanuel Salomon, to a succession of strikes in the boot trade, and there is not a tittle of evidence to modify or contradict his statement. It also appears from the evidence that all the members of the company were fully cognizant of the terms of the agreements of July 20 and August 2, 1892, and that they were willing to accept and did accept these terms.

At the close of the argument VAUGHAN WILLIAMS, J., announced that he was not prepared to grant the relief craved by the company. He at the same time suggested that a different remedy might be open to the company; and, on the motion of their counsel, he allowed the counter-claim to be amended. In conformity with the suggestion thus made by the bench, a new and alternative claim was added for a declaration that the company or the liquidator was entitled (1) to be indemnified by the appellant against the whole of the company's unsecured debts, namely, £7,733 8s. 3d.; (2) to judgment against the appellant for that sum; and (3) to a lien for that amount upon all sums which might be payable to the appellant by the company in respect of his debentures or otherwise, until the judgment was satisfied. There were also added averments to the effect that the company was formed by the appellant, and that the debentures for £10,000 were issued in order that he might carry on the business and take all the profits without risk to himself; and also that the company was the "mere nominee and agent" of the appellant.

VAUGHAN WILLIAMS, J., made an order for a declaration in the terms of the new and alternative counter-claim above stated, without making any order on the original counter-claim.

Both parties having appealed, the court of appeal, (LINDLEY, LOPES and KAY, L. JJ.,) being of opinion that the

formation of the company, the agreement of August, 1892, and the issue of debentures to the appellant pursuant to such agreement, were a mere scheme to enable him to carry on business in the name of the company with limited liability, contrary to the true intent and meaning of the Companies Act of 1862, and further to enable him to obtain a preference over other creditors of the company by procuring a first charge on the assets of the company by means of such debentures, dismissed the appeal with costs, and declined to make any order on the original counter-claim. (Reported as *Broderip v. Salomon*, [1895] 2 Ch. 323.)

Against this order the appellant appealed, and the company brought a cross-appeal against so much of it as declined to make any order upon the original counter-claim. Broderip having been paid off was no party to this appeal or cross-appeal.

June 15, 22, 29. *Cohen*, Q. C., and *Buckley*, Q. C. (*McCall*, Q. C., and *Muir Mackenzie* with them,) for the appellant in the original appeal.—The view of VAUGHAN WILLIAMS, J., that the company was the mere alias or agent of the appellant, so as to make him liable to indemnify the company against creditors, was not adopted by the court of appeal, who seem to have considered the company as the appellant's trustee. There is no evidence in favor of either view. The sale of the business was *bona fide*; the business was genuine and solvent, with a substantial surplus. All the circumstances were known to and approved by the shareholders. All the requirements of the Companies Act, 1862, were strictly complied with; the purpose was lawful; the proceedings were regular. How could the registrar refuse to register such a company? What objection is it that the vendor desires to convert his unlimited into a limited liability? That is the prime object of turning a private business into a limited company, practiced every day by banks and other great firms. And what difference to

creditors could it make whether the debentures were held by the vendor or by strangers? Whoever held them had the preference over creditors—that is, the future creditors—all the old creditors having been paid off by the vendor. There was no misrepresentation of fact, and no one was misled: where is “the fraud upon creditors” spoken of in the court of appeal? The creditors were under no obligation to trust the company; they might, if they had desired, have found out who held the shares, and in what proportion, and who held the debentures. There is not a word in §§ 6, 8, 30, 43, or any other section of the Companies Act, 1862, forbidding or even pointing against such a company so formed and for such objects. Then, if the company was a real company, fulfilling all the requirements of the legislature, it must be treated as a company, as an entity, consisting, indeed, of certain corporators, but a distinct and independent corporation. The court of appeal seem to treat the company sometimes as substantial and sometimes as shadowy and unreal; it must be one or the other, it cannot be both. A court cannot impose conditions not imposed by the legislature, and say that the shareholders must not be related to each other, or that they must hold more than one share each. There is nothing to prevent one shareholder or all the shareholders holding the shares in trust for some one person. What is prohibited is the entry of a trust on the register: § 30. If all the shares were held in trust that would not make the company a trustee. The authorities relied upon below (which all turn upon some one being deceived or defrauded,) do not touch the present case and do not support the judgment below.

[They referred to *Reg. v. Arnaud*, (1846) 9 Q. B. 806; *In re Ambrose Lake Tin & Copper Mining Co.*, (1880) 14 Ch. D. 390, 394, 398; *In re British Seamless Paper Box Co.*, (1881) 17 Ch. D. 467, 476, 479; *Farrar v. Farrars, Limited*, (1888) 40 Ch. D. 395; *Northwest Transportation Co. v. Beatty*, (1887) 12 App. Cas. 589; *In re National Debenture*

& Assets Corporation, [1891] 2 Ch. 505; *In re George Newman & Co.*, [1895] 1 Ch. 674, 685.]

As to the cross-appeal, there being no fraud, misrepresentation or deceit, not even any failure of consideration, there is no ground for rescission. Moreover, the company's assets having been sold, the company is not in a position to ask for it.

Farwell, Q. C., and *H. S. Theobald*, for the respondents.—The question is one of fact rather than law, and the true inferences from the facts are these: The appellant incorporated the company to carry on his business without risk to himself and at his creditors' expense. The business was decaying when the company was formed, and though carried on as before, nay, with more (borrowed) money, it failed very soon after the sale. To get an advantage over creditors the vendor took debentures and concealed the fact from them. The purchase money was exorbitant, the price dictated solely by the vendor, and there was no independent person acting for the company. Though incorporated under the acts, the company never had an independent existence; it was, in fact, the appellant under another name; he was the managing director, the other directors being his sons and under his control. The shareholders other than himself were his own family, and his vast preponderance of shares made him absolute master. He could pass any resolution, and he would receive all the profits—if any. Whether, therefore, the company is considered as his agent, or his nominee or his trustee, matters little. The business was solely his, conducted solely for him and by him, and the company was a mere sham and fraud, in effect entirely contrary to the intent and meaning of the Companies Act. The liquidator is therefore entitled to counter-claim against him for an indemnity. As to the cross-appeal and the claim for rescission, the decision in *Erlanger v. New Sombrero Phosphate Co.*, (1878) 3 App. Cas. 1218, 1236, 1238,

and the observations of Lord CAIRNS, are precisely applicable, and conclusive in favor of rescission. See, also, *Adam v. Newbigging*, (1888) 13 App. Cas. 308.

[Lord WATSON referred to *Western Bank of Scotland v. Addie*, (1867) 1 L. R. H. L. Sc. 145, following *Clarke v. Dickson*, (1858) E., B. & E. 148.]

[They also referred to *Ex parte Cowen*, (1867) 2 L. R. Ch. 563; *In re Smith*, (1890) 25 Q. B. D. 536, 541.]

The House took time for consideration.

November 16. Lord HALSBURY, L. C.—My Lords, the important question in this case, I am not certain it is not the only question, is whether the respondent company was a company at all—whether in truth that artificial creation of the legislature had been validly constituted in this instance; and in order to determine that question it is necessary to look at what the statute itself has determined in that respect. I have no right to add to the requirements of the statute, nor to take from the requirements thus enacted. The sole guide must be the statute itself.

Now, that there were seven actual living persons who held shares in the company has not been doubted. As to the proportionate amounts held by each I will deal presently; but it is important to observe that the first condition of the statute is satisfied, and it follows as a consequence that it would not be competent to any one—and certainly not to these persons themselves—to deny that they were shareholders.

I must pause here to point out that the statute enacts nothing as to the extent or degree of interest which may be held by each of the seven, or as to the proportion of interest or influence possessed by one or the majority of the shareholders over the others. One share is enough. Still less is it possible to contend that the motive of becoming shareholders or of making them shareholders is a field of inquiry which the statute itself recognizes as legitimate. If they

are shareholders, they are shareholders for all purposes; and even if the statute was silent as to the recognition of trusts, I should be prepared to hold that if six of them were the *cestuis que trust* of the seventh, whatever might be their rights *inter se*, the statute would have made them shareholders to all intents and purposes with their respective rights and liabilities, and, dealing with them in their relation to the company, the only relations which I believe the law would sanction would be that they were corporators of the corporate body.

I am simply here dealing with the provisions of the statute, and it seems to me to be essential to the artificial creation that the law should recognize only that artificial existence—quite apart from the motives or conduct of individual corporators. In saying this, I do not at all mean to suggest that if it could be established that this provision of the statute to which I am adverting had not been complied with, you could not go behind the certificate of incorporation to show that a fraud had been committed upon the officer entrusted with the duty of giving the certificate, and that by some proceeding in the nature of *scire facias* you could not prove the fact that the company had no real legal existence. But short of such proof it seems to me impossible to dispute that once the company is legally incorporated it must be treated like any other independent person, with its rights and liabilities appropriate to itself, and that the motives of those who took part in the promotion of the company are absolutely irrelevant in discussing what those rights and liabilities are.

I will for the sake of argument assume the proposition that the court of appeal lays down—that the formation of the company was a mere scheme to enable Aron Salomon to carry on business in the name of the company. I am wholly unable to follow the proposition that this was contrary to the true intent and meaning of the Companies Act. I can only find the true intent and meaning of the act from

the act itself; and the act appears to me to give a company a legal existence with, as I have said, rights and liabilities of its own, whatever may have been the ideas or schemes of those who brought it into existence.

I observe that the learned judge (VAUGHAN WILLIAMS, J.) held that the business was Mr. Salomon's business, and no one else's, and that he chose to employ as agent a limited company; and he proceeded to argue that he was employing that limited company as agent, and that he was bound to indemnify that agent (the company.) I confess it seems to me that that very learned judge becomes involved by this argument in a very singular contradiction. Either the limited company was a legal entity or it was not. If it was, the business belonged to it and not to Mr. Salomon. If it was not, there was no person and no thing to be an agent at all; and it is impossible to say at the same time that there is a company and there is not.

LINDLEY, L. J., on the other hand, affirms that there was seven members of the company; but he says it is manifest that six of them were members simply in order to enable the seventh himself to carry on business with limited liability. The object of the whole arrangement is to do the very thing which the legislature intended not to be done.

It is obvious to inquire where is that intention of the legislature manifested in the statute. Even if we were at liberty to insert words to manifest that intention, I should have great difficulty in ascertaining what the exact intention thus imputed to the legislature is, or was. In this particular case it is the members of one family that represent all the shares; but if the supposed intention is not limited to so narrow a proposition as this, that the seven shareholders must not be members of one family, to what extent may influence or authority or intentional purchase of a majority among the shareholders be carried so as to bring it within the supposed prohibition? It is, of course, easy to say that it was contrary to the intention of the

legislature—a proposition which, by reason of its generality, it is difficult to bring to the test; but when one seeks to put as an affirmative proposition what the thing is which the legislature has prohibited, there is, as it appears to me, an insuperable difficulty in the way of those who seek to insert by construction such a prohibition into the statute.

As one mode of testing the proposition, it would be pertinent to ask whether two or three, or indeed all seven, may constitute the whole of the shareholders? Whether they must be all independent of each other in the sense of each having an independent beneficial interest? And this is a question that cannot be answered by the reply that it is a matter of degree. If the legislature intended to prohibit something, you ought to know what that something is. All it has said is that one share is sufficient to constitute a shareholder, though the shares may be 100,000 in number. Where am I to get from the statute itself a limitation of that provision that that shareholder must be an independent and beneficially interested person?

My Lords, I find all through the judgment of the court of appeals a repetition of the same proposition to which I have already adverted—that the business was the business of Aron Salomon, and that the company is variously described as a myth and a fiction. LOPES, L. J., says: “The act contemplated the incorporation of seven independent *bona fide* members, who had a mind and a will of their own, and were not the mere puppets of an individual who, adopting the machinery of the act, carried on his old business in the same way as before, when he was a sole trader.” The words “seven independent *bona fide* members with a mind and will of their own, and not the puppets of an individual,” are by construction to be read into the act. LOPES, L. J., also said that the company was a mere *nomi- nis umbra*. KAY, L. J., says: “The statutes were intended to allow seven or more persons, *bona fide* associated for the purpose of trade, to limit their liability under certain con-

ditions and to become a corporation. But they were not intended to legalize a pretended association for the purpose of enabling an individual to carry on his own business with limited liability in the name of a joint stock company."

My Lords, the learned judges appear to me not to have been absolutely certain in their own minds whether to treat the company as a real thing or not. If it was a real thing, if it had a legal existence, and if consequently the law attributed to it certain rights and liabilities in its constitution as a company, it appears to me to follow as a consequence that it is impossible to deny the validity of the transactions into which it has entered.

VAUGHAN WILLIAMS, J., appears to me to have disposed of the argument that the company (which for this purpose he assumed to be a legal entity) was defrauded into the purchase of Aron Salomon's business, because, assuming that the price paid for the business was an exorbitant one, as to which I am myself not satisfied, but assuming that it was, the learned judge most cogently observes that when all the shareholders are perfectly cognizant of the conditions under which the company is formed and the conditions of the purchase, it is impossible to contend that the company is being defrauded.

The proposition laid down in *Erlanger v. New Sombrero Phosphate Co.*, 3 App. Cas. 1218, (I quote the head-note,) is that "Persons who purchase property and then create a company to purchase from them the property they possess, stand in a fiduciary position towards that company, and must faithfully state to the company the facts which apply to the property, and would influence the company in deciding on the reasonableness of acquiring it." But if every member of the company—every shareholder—knows exactly what is the true state of the facts (which for this purpose must be assumed to be the case here,) VAUGHAN WILLIAMS, J.'s conclusion seems to me to be inevitable that no case of fraud upon the company could here be established. If

there was no fraud and no agency, and if the company was a real one and not a fiction or a myth, every one of the grounds upon which it is sought to support the judgment is disposed of.

My Lords, the truth is that the learned judges have never allowed in their own minds the proposition that the company has a real existence. They have been struck by what they have considered the inexpediency of permitting one man to be in influence and authority the whole company; and, assuming that such a thing could not have been intended by the legislature, they have sought various grounds upon which they might insert into the act some prohibition of such a result. Whether such a result be right or wrong, politic or impolitic, I say, with the utmost deference to the learned judges, that we have nothing to do with that question if this company has been duly constituted by law; and whatever may be the motives of those who constitute it, I must decline to insert into that act of parliament limitations which are not to be found there.

I have dealt with this matter upon the narrow hypothesis propounded by the learned judges below; but it is, I think, only justice to the appellant to say that I see nothing whatever to justify the imputations which are implied in some of the observations made by more than one of the learned judges. The appellant, in my opinion, is not shown to have done or to have intended to do anything dishonest or unworthy, but to have suffered a great misfortune without any fault of his own.

The result is that I move your Lordships that the judgment appealed from be reversed; but as this is a pauper case, I regret to say it can only be with such costs in this house as are appropriate to that condition of things, and that the cross-appeal be dismissed with costs to the same extent.

Lord WATSON.—My Lords, this appeal raises some questions of practical importance, depending upon the construc-

tion of the Companies' Acts, which do not appear to have been settled by previous decisions. As I am not prepared to accept without reservation all the conclusions of fact which found favor with the courts below, I shall, before adverting to the law, state what I conceive to be the material facts established by the evidence before us. [His Lordship stated the facts above set out.]

The allegations of the company, in so far as they have any relation to the amended claim, their pith consisting in the averments made on amendment, were meant to convey a charge of fraud; and it is unfortunate that they are framed in such loose and general terms. A relevant charge of fraud ought to disclose facts necessitating the inference that a fraud was perpetrated upon some person specified. Whether it was a fraud upon the company and its members, or upon persons having dealings with the company, is not indicated, although there may be very different considerations applicable to those two cases. The *res gestæ* which might imply that it was the appellant, and not the company, who actually carried on its business, are not set forth. Any person who holds a preponderating share in the stock of a limited company has necessarily the intention of taking the lion's share of its profits without any risk beyond loss of the money which he has paid for, or is liable to pay upon his shares; and the fact of his acquiring and holding debentures secured upon the assets of the company does not diminish the risk of that loss. What is meant by the assertion that the company "was the mere nominee or agent" of the appellant I cannot gather from the record; and I am not sure that I understand precisely in what sense it was interpreted by the learned judges whose decisions we have to consider.

No additional proof was led after the amendment of the counter-claim. The oral testimony has very little, if any, bearing upon the second claim; and any material facts relating to the fraudulent objects which the appellant is said

to have had in view, and the alleged position of the company as his nominee or agent, must be mere matter of inference derived from the agreements of July 20 and August 2, 1892, the memorandum and articles of association, and the minute-book of the company.

On rehearing the case, VAUGHAN WILLIAMS, J., without disposing of the original claim, gave the company decree of indemnity in terms of their amended claim. I do not profess my ability to follow accurately the whole chain of reasoning by which the learned judge arrived at that conclusion; but he appears to have proceeded mainly upon the ground that the appellant was in truth the company, the other members being either his trustees or mere "dummies," and, consequently, that the appellant carried on what was truly his own business under cover of the name of the company, which was nothing more than an alias for Aron Salomon. On appeal from his decision, the court of appeal, consisting of LINDLEY, LOPES and KAY, L. JJ., made an order finding it unnecessary to deal with the original claim, and dismissing the appeal in so far as it related to the amended claim. The ratio upon which that affirmance proceeded, as embodied in the order, was: "This court being of opinion that the formation of the company, the agreement of August, 1892, and the issue of debentures to Aron Salomon pursuant to such agreement, were a mere scheme to enable him to carry on business in the name of the company, with limited liability, contrary to the true intent and meaning of the Companies Act, 1862, and further to enable him to obtain a preference over other creditors of the company by procuring a first charge on the assets of the company by means of such debentures." The opinions delivered by the Lords Justices are strictly in keeping with the reasons assigned in their order. LINDLEY, L. J., observing "that the incorporation of the company cannot be disputed," refers to the scheme for the formation of the company, and says, [1895] 2 Ch. 337, 339: "The object of the

whole arrangement is to do the very thing which the legislature intended not to be done;" and he adds that "Mr. Salomon's scheme is a device to defraud creditors."

Assuming that the company was well incorporated in terms of the act of 1862, an assumption upon which the decisions appealed from appear to me to throw considerable doubt, I think it expedient, before considering the amended claim, to deal with the original claim for rescission, which was strongly pressed upon us by counsel for the company, under their cross-appeal. Upon that branch of the case there does not appear to me to be much room for doubt. With this exception, that the word "exorbitant" appears to me to be too strong an epithet, I entirely agree with VAUGHAN WILLIAMS, J., when he says: "I do not think that where you have a private company, and all the shareholders in the company are perfectly cognizant of the conditions under which the company is formed, and the conditions of the purchase by the company, you can possibly say that purchasing at an exorbitant price (and I have no doubt whatever that the purchase here was at an exorbitant price,) is a fraud upon those shareholders or upon the company." The learned judge goes on to say that the circumstances might have amounted to fraud if there had been an intention on the part of the original shareholders "to allot further shares at a later period to future allottees." Upon that point I do not find it necessary to express any opinion, because it is not raised by the facts of the case, and, in any view, these considerations are of no relevancy in a question as to rescission between the company and the appellant.

Mr. Farwell argued that the agreement of August 2 ought to be set aside upon the principle followed by this house in *Erlanger v. New Sombrero Phosphate Co.*, 3 App. Cas. 1218. In that case the vendor, who got up the company, with the view of selling his adventure to it, attracted shareholders by a prospectus which was essentially false. The directors, who were virtually his nominees, purchased

from him without being aware of the real facts; and on their assurance that, in so far as they knew, all was right, the shareholders sanctioned the transaction. The fraud by which the company and its shareholders had been misled was directly traceable to the vendor; and it was set aside at the instance of the liquidator, the Lord Chancellor (Earl CAIRNS) expressing a doubt whether, even in those circumstances, the remedy was not too late after a liquidation order. But in this case the agreement of July 20 was, in the full knowledge of the facts, approved and adopted by the company itself, if there was a company, and by all the shareholders who ever were, or were likely to be, members of the company. In my opinion, therefore, *Erlanger v. New Sombrero Phosphate Co.*, 3 App. Cas. 1218, has no application, and the original claim of the liquidator is not maintainable.

The Lords Justices of Appeal, in disposing of the amended claim, have expressly found that the formation of the company, with limited liability, and the issue of £10,000 worth of its debentures to the appellant, were "contrary to the true intent and meaning of the Companies Act, 1862." I have had great difficulty in endeavoring to interpret that finding. I am unable to comprehend how a company, which has been formed contrary to the true intent and meaning of a statute, and (in the language of LINDLEY, L. J.,) does the very thing which the legislature intended not to be done, can yet be held to have been legally incorporated in the terms of the statute. "Intention of the legislature" is a common but very slippery phrase, which, popularly understood, may signify anything from intention embodied in positive enactment to speculative opinion as to what the legislature probably would have meant, although there has been an omission to enact it. In a court of law or equity, what the legislature intended to be done or not to be done, can only be legitimately ascertained from that which it has chosen to enact, either in ex-

press words or by reasonable and necessary implication. Accordingly, if the words "intent and meaning," as they occur in the finding of the appeal court, are used in their proper legal sense, it follows, in my opinion, that the company has not been well incorporated; that, there being no legal corporation, there can be no liquidation under the Companies Acts, and that the counter-claim preferred by its liquidator must fail. In that case its creditors would not be left without a remedy, because its members, as joint traders without limitation of their liability, would be jointly and severally responsible for the debts incurred by them in the name of the company.

The provisions of the act of 1862 which seem to me to have any bearing upon this point lie within a very narrow compass. Section 6 provides that any seven or more persons, associated for a lawful purpose, such as the manufacture and sale of boots, may, by subscribing their names to a memorandum of association and otherwise complying with the provisions of the act in respect of registration, form a company with or without limited liability; and § 8, which prescribes the essentials of the memorandum in the case of a company limited by shares, *inter alia* enacts that "no subscriber shall take less than one share." The first of these enactments does not require that the persons subscribing shall not be related to each other; and the second plainly imports that the holding of a single share affords a sufficient qualification for membership; and I can find no other rule laid down or even suggested in the act. Nor does the statute, either expressly or by implication, impose any limit upon the number of shares which a single member may subscribe for or take by allotment. At the date of the registration all the requirements of the act had been complied with; and, as matters then stood, there does not appear to have been any room for the plea now advanced by the liquidator. The company was still free to modify or reject the agreement of July 20; and the fraud of which

the appellant has been held guilty by the court of appeal, though it may have existed *in animo*, had not been carried into execution by the acceptance of the agreement, the issue of debentures to the appellant in terms of it, and by his receiving an allotment of shares which increased his interest in the company to $\frac{20001}{20000}$ of its actual capital. I have already intimated my opinion that the acceptance of the agreement is binding on the company, and neither that acceptance, nor the preponderating share of the appellant, nor his payment in debentures, being forbidden by the act, I do not think that any one of these could subsequently render the registration of the company invalid. But I am willing to assume that proceedings which are permitted by the act may be so used by the members of a limited company as to constitute a fraud upon others, to whom they in consequence incur personal liability. In this case the fraud is found to have been committed by the appellant against the creditors of the company; but it is clear that if so, though he may have been its originator and the only person who took benefit from it, he could not have done any one of those things, which, taken together, are said to constitute his fraud, without the consent and privity of the other shareholders. It seems doubtful whether a liquidator, as representing, and in the name of the company, can sue its members for redress against a fraud which was committed by the company itself and by all its shareholders. However, I do not think it necessary to dwell upon that point, because I am not satisfied that the charge of fraud against creditors has any foundation in fact.

The memorandum of association gave notice that the main object for which the company was formed was to adopt and carry into effect, with or without modifications, the agreement of July, 1892, in terms of which the debentures for £10,000 were subsequently given to the appellant in part payment of the price. By the articles of association (Article 62 (e)) the directors were empowered to issue

mortgage or other debentures or bonds for any debts due, or to become due, from the company ; and it is not alleged or proved that there was any failure to comply with § 43 or the other clauses (Part III of the act) which relate to the protection of creditors. The unpaid creditors of the company, whose unfortunate position has been attributed to the fraud of the appellant, if they had thought fit to avail themselves of the means of protecting their interests which the act provides, could have informed themselves of the terms of purchase by the company, of the issue of debentures to the appellant, and of the amount of shares held by each member. In my opinion, the statute casts upon them the duty of making inquiry in regard to these matters. Whatever may be the moral duty of a limited company and its shareholders, when the trade of the company is not thriving, the law does not lay any obligation upon them to warn those members of the public who deal with them on credit that they run the risk of not being paid. One of the learned judges asserts, and I see no reason to question the accuracy of his statement, that creditors never think of examining the register of debentures. But the apathy of a creditor cannot justify an imputation of fraud against a limited company or its members, who have provided all the means of information which the act of 1862 requires ; and, in my opinion, a creditor who will not take the trouble to use the means which the statute provides for enabling him to protect himself must bear the consequences of his own negligence.

For these reasons I have come to the conclusion that the orders appealed from ought to be reversed, with costs to the appellant here and in both courts below. His costs in this house must, of course, be taxed in accordance with the rule applicable to pauper litigants.

LORD HERSCHELL.—My Lords, by an order of the high court, which was affirmed by the court of appeal, it was

declared that the respondent company, or the liquidator of that company, was entitled to be indemnified by the appellant against the sum of £7,733 8s. 3d., and it was ordered that the respondent company should recover that sum against the appellant.

On July 28, 1892, the respondent company was incorporated with a capital of £40,000, divided into forty thousand shares at £1 each. One of the objects for which the company was incorporated was to carry out an agreement, with such modifications therein as might be agreed to, of July 20, 1892, which had been entered into between the appellant and a trustee for a company intended to be formed, for the acquisition by the company of the business then carried on by the appellant. The company was, in fact, formed for the purpose of taking over the appellant's business of leather merchant and boot manufacturer, which he had carried on for many years. The business had been a prosperous one, and, as the learned judge who tried the action found, was solvent at the time when the company was incorporated. The memorandum of association of the company was subscribed by the appellant, his wife and daughter, and his four sons, each subscribing for one share. The appellant afterwards had twenty thousand shares allotted to him. For these he paid £1 per share out of the purchase money, which by agreement he was to receive for the transfer of his business to the company. The company afterwards became insolvent and went into liquidation.

In an action brought by a debenture-holder on behalf of himself and all the other debenture-holders, including the appellant, the respondent company set up by way of counter-claim that the company was formed by Aron Salomon, and the debentures were issued in order that he might carry on the said business, and take all the profits without risk to himself; that the company was the mere nominee and agent of Aron Salomon; and that the company, or the liquidator thereof, was entitled to be indemnified by Aron

Salomon against all the debts owing by the company to creditors other than Salomon. This counter-claim was not in the pleading as originally delivered; it was inserted by way of amendment, at the suggestion of VAUGHAN WILLIAMS, J., before whom the action came on for trial. The learned judge thought the liquidator entitled to the relief asked for, and made the order complained of. He was of opinion that the company was only an "alias" for Salomon; that the intention being that he should take the profits without running the risk of the debts, the company was merely an agent for him, and, having incurred liabilities at his instance, was, like any other agent under such circumstances, entitled to be indemnified by him against them. On appeal the judgment of VAUGHAN WILLIAMS, J., was affirmed by the court of appeal, that court "being of opinion that the formation of the company, the agreement of August, 1892, and the issue of debentures to Aron Salomon, pursuant to such agreement, were a mere scheme to enable him to carry on business in the name of the company with limited liability, contrary to the true intent and meaning of the Companies Act, 1862, and further to enable him to obtain a preference over other creditors of the company by procuring a first charge on the assets of the company by means of such debentures."

The learned judges in the court of appeal dissented from the view taken by VAUGHAN WILLIAMS, J., that the company was to be regarded as the agent of the appellant. They considered the relation between them to be that of trustee and *cestui que trust*, but this difference of view, of course, did not affect the conclusion that the right to the indemnity claimed had been established.

It is to be observed that both courts treated the company as a legal entity distinct from Salomon and the then members who composed it, and therefore as a validly constituted corporation. This is, indeed, necessarily involved in the judgment which declared that the company was entitled to certain rights as against Salomon. Under these circum-

stances I am at a loss to understand what is meant by saying that A. Salomon & Co., Limited, is but an "alias" for A. Salomon. It is not another name for the same person; the company is *ex hypothesi* a distinct legal *persona*. As little am I able to adopt the view that the company was the agent of Salomon to carry on his business for him. In a popular sense a company may in every case be said to carry on business for and on behalf of its shareholders; but this certainly does not in point of law constitute the relation of principal and agent between them, or render the shareholders liable to indemnify the company against the debts which it incurs. Here, it is true, Salomon owned all the shares except six, so that if the business were profitable he would be entitled, substantially, to the whole of the profits. The other shareholders, too, are said to have been "dummies," the nominees of Salomon. But when once it is conceded that they were individual members of the company distinct from Salomon, and sufficiently so to bring into existence in conjunction with him a validly constituted corporation, I am unable to see how the facts to which I have just referred can affect the legal position of the company, or give it rights as against its members which it would not otherwise possess.

The court of appeal based their judgment on the proposition that the formation of the company and all that followed on it were a mere scheme to enable the appellant to carry on business in the name of the company, with limited liability, contrary to the true intent and meaning of the Companies Act, 1862. The conclusion which they drew from this premise was that the company was a trustee and Salomon their *cestui que trust*. I cannot think that the conclusion follows even if the premise be sound. It seems to me that the logical result would be that the company had not been validly constituted, and therefore had no legal existence. But, apart from this, it is necessary to examine the proposition on which the court have rested

their judgment, as its effect would be far reaching. Many industrial and banking concerns of the highest standing and credit have, in recent years, been, to use a common expression, converted into joint stock companies, and often into what are called "private" companies, where the whole of the shares are held by the former partners. It appears to me that all these might be pronounced "schemes to enable" them "to carry on business in the name of the company, with limited liability," in the very sense in which those words are used in the judgment of the court of appeal. The profits of the concern carried on by the company will go to the persons whose business it was before the transfer, and in the same proportions as before, the only difference being that the liability of those who take the profits will no longer be unlimited. The very object of the creation of the company and the transfer to it of the business is, that whereas the liability of the partners for debts incurred was without limit, the liability of the members for the debts incurred by the company shall be limited. In no other respect is it intended that there shall be any difference: the conduct of the business and the division of the profits are intended to be the same as before. If the judgment of the court of appeal be pushed to its logical conclusion, all these companies must, I think, be held to be trustees for the partners who transferred the business to them, and those partners must be declared liable without limit to discharge the debts of the company. For this is the effect of the judgment as regards the respondent company. The position of the members of a company is just the same whether they are declared liable to pay the debts incurred by the company, or by way of indemnity to furnish the company with the means of paying them. I do not think the learned judges in the court below have contemplated the application of their judgment to such cases as I have been considering; but I can see no solid distinction between those cases and the present one.

It is said that the respondent company is a "one man" company, and that in this respect it differs from such companies as those to which I have alluded. But it has often happened that a business transferred to a joint stock company has been the property of three or four persons only, and that the other subscribers of the memorandum have been clerks or other persons who possessed little or no interest in the concern. I am unable to see how it can be lawful for three or four or six persons to form a company for the purpose of employing their capital in trading, with the benefit of limited liability, and not for one person to do so, provided, in each case, the requirements of the statute have been complied with and the company has been validly constituted. How does it concern the creditor whether the capital of the company is owned by seven persons in equal shares, with the right to an equal share of the profits, or whether it is almost entirely owned by one person, who practically takes the whole of the profits? The creditor has notice that he is dealing with a company, the liability of the members of which is limited, and the register of shareholders informs him how the shares are held, and that they are substantially in the hands of one person, if this be the fact. The creditors in the present case gave credit to and contracted with a limited company; the effect of the decision is to give them the benefit, as regards one of the shareholders, of unlimited liability. I have said that the liability of persons carrying on business can only be limited provided the requirements of the statute be complied with; and this leads naturally to the inquiry, What are those requirements?

The court of appeal has declared that the formation of the respondent company and the agreement to take over the business of the appellant were a scheme "contrary to the true intent and meaning of the Companies Act." I know of no means of ascertaining what is the intent and meaning of the Companies Act except by examining its provisions and finding what regulations it has imposed as a

condition of trading with limited liability. The memorandum must state the amount of the capital of the company and the number of shares into which it is divided, and no subscriber is to take less than one share. The shares may, however, be of as small a nominal value as those who form the company please: the statute prescribes no minimum; and though there must be seven shareholders, it is enough if each of them holds one share, however small its denomination. The legislature, therefore, clearly sanctions a scheme by which all the shares except six are owned by a single individual, and these six are of a value little more than nominal.

It was said that in the present case the six shareholders other than the appellant were mere dummies, his nominees, and held their shares in trust for him. I will assume that this was so. In my opinion, it makes no difference. The statute forbids the entry in the register of any trust; and it certainly contains no enactment that each of the seven persons subscribing the memorandum must be beneficially entitled to the share or shares for which he subscribes. The persons who subscribe the memorandum, or who have agreed to become members of the company and whose names are on the register, are alone regarded as, and in fact are, the shareholders. They are subject to all the liability which attaches to the holding of the share. They can be compelled to make any payment which the ownership of a share involves. Whether they are beneficial owners or bare trustees is a matter with which neither the company nor creditors have anything to do; it concerns only them and their *cestuis que trust* if they have any. If, then, in the present case all the requirements of the statute were complied with, and a company was effectually constituted, and this is the hypothesis of the judgment appealed from, what warrant is there for saying that what was done was contrary to the true intent and meaning of the Companies Act?

It may be that a company constituted like that under consideration was not in the contemplation of the legislature at the time when the act authorizing limited liability was passed; that if what is possible under the enactments as they stand had been foreseen, a minimum sum would have been fixed as the least denomination of share permissible; and that it would have been made a condition that each of the seven persons should have a substantial interest in the company. But we have to interpret the law, not to make it; and it must be remembered that no one need trust a limited liability company unless he so please, and that before he does so he can ascertain, if he so please, what is the capital of the company and how it is held.

I have hitherto made no reference to the debentures which the appellant received in part payment of the purchase money of the business which he transferred to the company. These are referred to in the judgment as part of the scheme which is pronounced contrary to the true intent and meaning of the Companies Act. But if apart from this the conclusion that the appellant is bound to indemnify the company against its debts cannot be sustained, I do not see how the circumstance that he received these debentures can avail the respondent company. The issue of debentures to the vendor of a business as part of the price is certainly open to great abuse, and has often worked grave mischief. It may well be that some check should be placed upon the practice, and that, at all events, ample notice to all who may have dealings with the company should be secured. But as the law at present stands, there is certainly nothing unlawful in the creation of such debentures. For these reasons I have come to the conclusion that the appeal should be allowed.

It was contended on behalf of the company that the agreement between them and the appellant ought, at all events, to be set aside on the ground of fraud. In my opinion, no such case has been made out, and I do not

think the respondent company are entitled to any such relief.

Lord MACNAGHTEN.—My Lords, I cannot help thinking that the appellant, Aron Salomon, has been dealt with somewhat hardly in this case.

Mr. Salomon, who is now suing as a pauper, was a wealthy man in July, 1892. He was a boot and shoe manufacturer, trading on his own sole account under the firm of "A. Salomon & Co.," in High street, Whitechapel, where he had extensive warehouses and a large establishment. He had been in the trade over thirty years. He had lived in the same neighborhood all along, and for many years past he had occupied the same premises. So far things had gone very well with him. Beginning with little or no capital, he had gradually built up a thriving business, and he was undoubtedly in good credit and repute.

It is impossible to say exactly what the value of the business was. But there was a substantial surplus of assets over liabilities. And it seems to me to be pretty clear that if Mr. Salomon had been minded to dispose of his business in the market as a going concern he might fairly have counted upon retiring with at least £10,000 in his pocket.

Mr. Salomon, however, did not want to part with the business. He had a wife and family, consisting of five sons and a daughter. Four of the sons were working with their father. The eldest, who was about thirty years of age, was practically the manager. But the sons were not partners; they were only servants. Not unnaturally, perhaps, they were dissatisfied with their position. They kept pressing their father to give them a share in the concern. "They troubled me," says Mr. Salomon, "all the while." So at length Mr. Salomon did what hundreds of others have done under similar circumstances. He turned his business into

a limited company. He wanted, he says, to extend the business and make provision for his family. In those words, I think, he fairly describes the principal motives which influenced his action.

All the usual formalities were gone through; all the requirements of the Companies Act, 1862, were duly observed. There was a contract with a trustee in the usual form for the sale of the business to a company about to be formed. There was a memorandum of association duly signed and registered, stating that the company was formed to carry that contract into effect, and fixing the capital at £40,000, in 40,000 shares of £1 each. There were articles of association providing the usual machinery for conducting the business. The first directors were to be nominated by the majority of the subscribers to the memorandum of association. The directors, when appointed, were authorized to exercise all such powers of the company as were not by statute or by the articles required to be exercised in general meeting; and there was express power to borrow on debentures, with the limitation that the borrowing was not to exceed £10,000 without the sanction of a general meeting.

The company was intended from the first to be a private company; it remained a private company to the end. No prospectus was issued; no invitation to take shares was ever addressed to the public.

The subscribers to the memorandum were Mr. Salomon, his wife, and five of his children who were grown up. The subscribers met and appointed Mr. Salomon and his two elder sons directors. The directors then proceeded to carry out the proposed transfer. By an agreement dated August 2, 1892, the company adopted the preliminary contract, and in accordance with it the business was taken over by the company as from June 1, 1892. The price fixed by the contract was duly paid. The price on paper was extravagant. It amounted to over £39,000—a sum which represented the sanguine expectations of a fond owner rather

than anything that can be called a business-like or reasonable estimate of value. That, no doubt, is a circumstance which at first sight calls for observation; but when the facts of the case and the position of the parties are considered, it is difficult to see what bearing it has on the question before your Lordships. The purchase money was paid in this way: as money came in, sums amounting in all to £30,000 were paid to Mr. Salomon, and then immediately returned to the company in exchange for fully-paid shares. The sum of £10,000 was paid in debentures for the like amount. The balance, with the exception of about £1,000 which Mr. Salomon seems to have received and retained, went in discharge of the debts and liabilities of the business at the time of the transfer, which were thus entirely wiped off. In the result, therefore, Mr. Salomon received for his business about £1,000 in cash, £10,000 in debentures, and half the nominal capital of the company in fully-paid shares for what they were worth. No other shares were issued except the seven shares taken by the subscribers to the memorandum, who, of course, knew all the circumstances, and had therefore no ground for complaint on the score of over-valuation.

The company had a brief career: it fell upon evil days. Shortly after it was started there seems to have come a period of great depression in the boot and shoe trade. There were strikes of workmen, too; and in view of that danger contracts with public bodies, which were the principal source of Mr. Salomon's profit, were split up and divided between different firms. The attempts made to push the business on behalf of the new company crammed its warehouses with unsalable stock. Mr. Salomon seems to have done what he could: both he and his wife lent the company money; and then he got his debentures cancelled and re-issued to a Mr. Broderip, who advanced him £5,000, which he immediately handed over to the company on loan. The temporary relief only hastened ruin. Mr. Broderip's inter-

est was not paid when it became due. He took proceedings at once and got a receiver appointed. Then, of course, came liquidation and a forced sale of the company's assets. They realized enough to pay Mr. Broderip, but not enough to pay the debentures in full; and the unsecured creditors were consequently left out in the cold.

In this state of things the liquidator met Mr. Broderip's claim by a counter-claim, to which he made Mr. Salomon a defendant. He disputed the validity of the debentures on the ground of fraud. On the same ground he claimed rescission of the agreement for the transfer of the business, cancellation of the debentures, and re-payment by Mr. Salomon of the balance of the purchase money. In the alternative, he claimed payment of £20,000 on Mr. Salomon's shares, alleging that nothing had been paid on them.

When the trial came on before VAUGHAN WILLIAMS, J., the validity of Mr. Broderip's claim was admitted, and it was not disputed that the 20,000 shares were fully paid up. The case presented by the liquidator broke down completely; but the learned judge suggested that the company had a right of indemnity against Mr. Salomon. The signatories of the memorandum of association were, he said, mere nominees of Mr. Salomon—mere dummies. The company was Mr. Salomon in another form. He used the name of the company as an alias. He employed the company as his agent; so the company, he thought, was entitled to indemnity against its principal. The counter-claim was accordingly amended to raise this point; and on the amendment being made the learned judge pronounced an order in accordance with the view he had expressed.

The order of the learned judge appears to me to be founded on a misconception of the scope and effect of the Companies Act, 1862. In order to form a company limited by shares, the act requires that a memorandum of association should be signed by seven persons, who are each to take one share at least. If those conditions are complied

with, what can it matter whether the signatories are relations or strangers? There is nothing in the act requiring that the subscribers to the memorandum should be independent or unconnected, or that they or any one of them should take a substantial interest in the undertaking, or that they should have a mind and will of their own, as one of the learned Lords Justices seems to think, or that there should be anything like a balance of power in the constitution of the company. In almost every company that is formed the statutory number is eked out by clerks or friends, who sign their names at the request of the promoter or promoters without intending to take any further part or interest in the matter.

When the memorandum is duly signed and registered, though there be only seven shares taken, the subscribers are a body corporate "capable forthwith," to use the words of the enactment, "of exercising all the functions of an incorporated company." Those are strong words. The company attains maturity on its birth. There is no period of minority—no interval of incapacity. I cannot understand how a body corporate, thus made "capable" by statute, can lose its individuality by issuing the bulk of its capital to one person, whether he be a subscriber to the memorandum or not. The company is at law a different person altogether from the subscribers to the memorandum; and, though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustee for them. Nor are the subscribers, as members, liable in any shape or form, except to the extent and in the manner provided by the act. That is, I think, the declared intention of the enactment. If the view of the learned judge were sound, it would follow that no common-law partnership could register as a company limited by shares without remaining subject to unlimited liability.

Mr. Salomon appealed; but his appeal was dismissed with costs, though the appellate court did not entirely accept the view of the court below. The decision of the court of appeal proceeds on a declaration of opinion embodied in the order which has been already read.

I must say that I, too, have great difficulty in understanding this declaration. If it only means that Mr. Salomon availed himself to the full of the advantages offered by the act of 1862, what is there wrong in that? Leave out the words "contrary to the true intent and meaning of the Companies Act, 1862," and bear in mind that "the creditors of the company" are not the creditors of Mr. Salomon, and the declaration is perfectly innocent; it has no sting in it.

In an early case, which in some of its aspects is not unlike the present, the owners of a colliery (to quote the language of GIFFARD, L. J., in the court of appeal) "went on working the colliery not very successfully, and then determined to form a limited company in order to avoid incurring further personal liability." "It was," adds the Lord Justice, "the policy of the Companies Act to enable this to be done." And so he reversed the decision of MALINS, V. C., who had expressed an opinion that if the laws of the country sanctioned such a proceeding they were "in a most lamentable state," and had fixed the former owners with liability for the amount of the shares they took in exchange for their property: *In re Baglan Hall Colliery Co.*, 5 L. R. Ch. 346.

Among the principal reasons which induce persons to form private companies, as is stated very clearly by Mr. Palmer in his treatise on the subject, are the desire to avoid the risk of bankruptcy, and the increased facility afforded for borrowing money. By means of a private company, as Mr. Palmer observes, a trade can be carried on with limited liability, and without exposing the persons interested in it in the event of failure to the harsh provisions

of the bankruptcy law. A company, too, can raise money on debentures, which an ordinary trader cannot do. Any member of a company, acting in good faith, is as much entitled to take and hold the company's debentures as an outside creditor. Every creditor is entitled to get and to hold the best security the law allows him to take.

If, however, the declaration of the court of appeal means that Mr. Salomon acted fraudulently or dishonestly, I must say I can find nothing in the evidence to support such an imputation. The purpose for which Mr. Salomon and the other subscribers to the memorandum were associated was "lawful." The fact that Mr. Salomon raised £5,000 for the company on debentures that belonged to him seems to me strong evidence of his good faith and of his confidence in the company. The unsecured creditors of A. Salomon & Co., Limited, may be entitled to sympathy, but they have only themselves to blame for their misfortunes. They trusted the company, I suppose, because they had long dealt with Mr. Salomon, and he had always paid his way; but they had full notice that they were no longer dealing with an individual, and they must be taken to have been cognizant of the memorandum and of the articles of association. For such a catastrophe as has occurred in this case some would blame the law that allows the creation of a floating charge. But a floating charge is too convenient a form of security to be lightly abolished. I have long thought, and I believe some of your Lordships also think, that the ordinary trade creditors of a trading company ought to have a preferential claim on the assets in liquidation in respect of debts incurred within a certain limited time before the winding-up. But that is not the law at present. Everybody knows that when there is a winding-up debenture holders generally step in and sweep off everything; and a great scandal it is.

It has become the fashion to call companies of this class "one-man companies." That is a taking nickname, but it does not help one much in the way of argument. If it is

intended to convey the meaning that a company which is under the absolute control of one person is not a company legally incorporated, although the requirements of the act of 1862 may have been complied with, it is inaccurate and misleading. If it merely means that there is a predominant partner possessing an overwhelming influence and entitled practically to the whole of the profits, there is nothing in it that I can see contrary to the true intention of the act of 1862, or against public policy, or detrimental to the interests of creditors. If the shares are fully paid up, it cannot matter if they are in the hands of one or many. If the shares are not fully paid, it is as easy to gauge the solvency of an individual as to estimate the financial ability of a crowd.

One argument was addressed to your Lordships which ought perhaps to be noticed, although it was not the ground of decision in either of the courts below. It was argued that the agreement for the transfer of the business to the company ought to be set aside, because there was no independent board of directors, and the property was transferred at an overvalue. There are, it seems to me, two answers to that argument. In the first place, the directors did just what they were authorized to do by the memorandum of association. There was no fraud or misrepresentation, and there was nobody deceived. In the second place, the company have put it out of their power to restore the property which was transferred to them. It was said that the assets were sold by an order made in the presence of Mr. Salomon, though not with his consent, which declared that the sale was to be without prejudice to the rights claimed by the company by their counter-claim. I cannot see what difference that makes. The reservation in the order seems to me to be simply nugatory.

I am of opinion that the appeal ought to be allowed and the counter-claim of the company dismissed with costs, both here and below.

Lord MORRIS.—My Lords, I quite concur in the judgment which has been announced, and in the reasons which have been so fully given for it.

Lord DAVEY.—My Lords, it is possible, and (I think) probable, that the conclusion to which I feel constrained to come in this case may not have been contemplated by the legislature, and may be due to some defect in the machinery of the act. But, after all, the intention of the legislature must be collected from the language of its enactments; and I do not see my way to holding that if there are seven registered members the association is not a company formed in compliance with the provisions of the act and capable of carrying on business with limited liability, either because the bulk of the shares are held by some only, or even one of the members, and the others are what is called “dummies,” holding, it may be, only one share of £1 each, or because there are less than seven persons who are beneficially entitled to the shares.

I think that this result follows from the absence of any provision fixing a minimum nominal amount of a share—the provision in § 8 that no subscriber shall take less than one share, and the provision in § 30 that no notice of any trust shall be entered on the register. With regard to the latter provision it would, in my opinion, be impossible to work the machinery of the act on any other principle, and to attempt to do so would lead only to confusion and uncertainty. The learned counsel for the respondent (wisely, as I think,) did not lay any stress on the members, other than the appellant, being trustees for him of their shares. Their argument was that they were “dummies,” and did not hold a substantial interest in the company—*i. e.*, what a jury would say is a substantial interest. In the language of some of the judges in the court below, any jury, if asked the question, would say the business was Aron Salomon's and no one else's.

It was not argued in this case that there was no association of seven persons to be registered, and the registration, therefore, operated nothing, or that the so-called company was a sham and might be disregarded; and, indeed, it would have been difficult, too, for the learned counsel for the respondents, appearing, as they did, at your Lordship's bar for the company, who had been permitted to litigate in the courts below as actors, (on their counter-claim,) to contend that their clients were non-existent. I do not say that such an argument ought to or would prevail; I only observe that, having regard to the decisions, it is not certain that § 18, making the certificate of the registrar conclusive evidence that all the requisitions of the act in respect of registration had been complied with, would be an answer to it.

We start, then, with the assumption that the respondents have a corporate existence, with power to sue and be sued, to incur debts and be wound up, and to act as agents or as trustees, and I suppose, therefore, to hold property. Both the courts below have, however, held that the appellant is liable to indemnify the company against all its debts and liabilities. VAUGHAN WILLIAMS, J., held that the company was an "alias" for the appellant, who carried on his business through the company as his agent, and that he was bound to indemnify his own agent; and he arrived at this conclusion on the ground that the other members of the company had no substantial interest in it, and the business in substance was the appellant's. The court of appeal thought the relation of the company to the appellant was that of trustee to *cestui que trust*.

The ground on which the learned judges seem to have chiefly relied was that it was an attempt by an individual to carry on his business with limited liability, which was forbidden by the act and unlawful. I observe, in passing, that nothing turns upon there being only one person interested. The argument would have been just as good if there had been six members holding the bulk of the shares

and one member with a very small interest, say one share. I am at a loss to see how in either view taken in the courts below the conclusion follows from the premises, or in what way the company became an agent or trustee for the appellant, except in the sense in which every company may loosely and inaccurately be said to be an agent for earning profits for its members, or a trustee of its profits for the members amongst whom they are to be divided. There was certainly no express trust for the appellant, and an implied or constructive trust can only be raised by virtue of some equity. I took the liberty of asking the learned counsel what the equity was, but got no answer. By an "alias" is usually understood a second name for one individual; but here, as one of your Lordships has already observed, we have, *ex hypothesi*, a duly formed legal *persona*, with corporate attributes and capable of incurring legal liabilities. Nor do I think it legitimate to inquire whether the interest of any member is substantial when the act has declared that no member need hold more than one share, and has not prescribed any minimum amount of a share. If, as was said in the court of appeal, the company was formed for an unlawful purpose, or in order to achieve an object not permitted by the provisions of the act, the appropriate remedy (if any) would seem to be to set aside the certificate of incorporation, or to treat the company as a nullity, or, if the appellant has committed a fraud or misdemeanor, (which I do not think he has,) he may be proceeded against civilly or criminally; but how either of those states of circumstances creates the relation of *cestui que trust* and trustee, or principal and agent, between the appellant and respondents, is not apparent to my understanding.

I am, therefore, of opinion that the order appealed from cannot be supported on the grounds stated by the learned judges.

But Mr. Farwell also relied on the alternative relief claimed by his pleadings, which was quite open to him

here—namely, that the contract for purchase of the appellant's business ought to be set aside for fraud. The fraud seems to consist in the alleged exorbitance of the price and the fact that there was no independent board of directors with whom the appellant could contract. I am of opinion that the fraud was not made out. I do not think the price of the appellant's business (which seems to have been a genuine one, and for some time a prosperous business,) was so excessive as to afford grounds for rescission; and as regards the cash portion of the price, it must be observed that, as the appellant held the bulk of the shares, or (the respondents say) was the only shareholder, the money required for the payment of it came from himself in the form either of calls on his shares or profits which would otherwise be divisible. Nor was the absence of any independent board material in a case like the present. I think it an inevitable inference from the circumstances of the case that every member of the company assented to the purchase, and the company is bound in a matter *intra vires* by the unanimous agreement of its members. In fact, it is impossible to say who was defrauded.

Mr. Farwell relied on some dicta in *Erlanger v. New Sombrero Phosphate Co.*, 3 App. Cas. 1218, 1236, a case which is often quoted and not infrequently misunderstood. Of course, Lord CAIRNS's observations were directed only to a case such as he had before him, where it was attempted to bind a large body of shareholders by a contract which purported to have been made between the vendor and directors before the shares were offered for subscription; whereas it appeared that the directors were only the nominees of the vendor, who had accepted his bidding and exercised no judgment of their own. It has nothing to do with the present case. That a company may contract with the holder of the bulk of its shares, and such contract will be binding though carried by the votes of that shareholder, was decided in *Northwest Transportation Co. v. Beatty*, 12 App. Cas. 589.

For these reasons, I am of opinion that the appellant's appeal should be allowed and the cross-appeal should be dismissed. I agree to the proposed order as to costs.

Order of the court of appeal reversed and cross-appeal dismissed with costs here and below; the costs in this house to be taxed in the manner usual when the appellant sues *in forma pauperis*. Cause remitted to the chancery division.

Corporations — Incorporation — Fraud on Creditors — Creditors' Bill—Pleading.

BENNETT v. MINOTT ET AL.

(Supreme Court of Oregon. March 23, 1896.)

(28 Oreg. 339 ; 44 Pac. Rep. 288.)

When a debtor, for the purpose of hindering and delaying creditors, organizes a corporation, and transfers to it all his assets, he himself being the owner of practically all the corporate stock, continuing the business the same after as before the incorporation, and using the proceeds for his own benefit, equity will set aside the transfer at the instance of creditors, notwithstanding the incorporation was valid, and the corporate stock taken by the debtor subject to sale under execution.

A creditors' bill to set aside a transfer alleged that plaintiff had previously commenced an action against the debtor in which the latter's entire stock in the hands of the transferee was duly attached. The answer denied this allegation, and the judgment roll in the alleged action was admitted without objection. *Held*, that after judgment the objection could not be urged that the bill neither alleged the name of the court in which the attachment suit was brought nor that the indebtedness on which it was based was due and payable.

A creditor need not reduce his claim to judgment before filing a creditors' bill to reach assets of his debtor which have been transferred in fraud of creditors, a lien by attachment being sufficient.

Appeal from Circuit Court, Coos county ; J. C. FULLERTON, Judge.

Proceeding in the name of a creditors' bill by Sanford Bennett against T. S. Minott and others. From the decree, both plaintiff and defendant, the Coos Bay Hardware Company, appeal. Affirmed.

This is a proceeding in the nature of a creditors' bill to subject certain property—alleged to have been transferred by the defendant T. S. Minott to his co-defendants, the Coos Bay Hardware Company, a corporation, and Lizzie H. Minott, for the purpose of hindering, delaying and defrauding creditors—to the payment of plaintiff's claim. From the pleadings and evidence it appears that, from the 1st day of August, 1890, to the 11th day of June, 1892, Minott was engaged in the hardware business at Marshfield, in this state, and during that time became largely indebted to plaintiff and his assignors, and to defendants, Hexter, May & Co., D. M. Osborne & Co., and other wholesale merchants, for goods sold and delivered to him. While being pressed by his creditors, he, on the latter date, caused the formation of said corporation, with a nominal capital of \$30,000, divided into 300 shares of the par value of \$100 each, of which he subscribed for 120 shares, his wife for 40, and his attorney and friend for one each. The corporation was subsequently organized, and Minott was elected president, general manager and treasurer, under a contract to serve for one year at a salary of \$150 per month. He thereupon assigned and transferred to the corporation his stock of hardware and business, which was substantially all the property he owned not exempt from execution, at a valuation of about \$12,000, in payment for the shares of stock subscribed by him. In this transaction he acted both for himself as an individual and for the corporation of which he was president, general manager and treasurer, and substantially the owner. About thirty days after the formation of the corporation he assigned and transferred to his wife, the defendant Lizzie H. Minott, all of his shares in the corporation, except nine, in payment of a debt he claimed to

owe her. He thereafter proceeded to do business substantially as before, but under the name of the corporation, selling and disposing of the goods, and applying the proceeds thereof to his own individual use. His creditors being unable to effect a satisfactory settlement with him, the defendants Hexter, May & Co., in August, 1892, attached a part of the stock of goods transferred by Minott to the hardware company, and on September 6 another part was attached by the defendants D. M. Osborne & Co., each of whom afterwards recovered judgment against Minott, containing an order of sale of the attached property. On September 22, 1892, Baker & Hamilton duly recovered a judgment against him for \$231.95, upon which an execution was subsequently issued and returned *nulla bona*. On October 22 plaintiff, for himself and as assignee of a large number of the other creditors, commenced an action, and had the entire stock of goods in the possession of the hardware company attached as the property of Minott. Based upon said attachment, and the judgment in favor of Baker & Hamilton, which was duly assigned to him, the plaintiff instituted this suit to set aside the transfer of the stock of goods from Minott to the hardware company, and to subject it to the payment of his demands, together with two lots in Dean's addition to Marshfield, which had been previously purchased by Minott, and upon his direction conveyed to his wife. A receiver was appointed, and the merchandise sold by him under the order of the court, and the proceeds thereof now await distribution. The case was afterwards tried, and a decree rendered adjudging the sale of the stock of goods by Minott to the corporation to be void as to creditors, but holding that there was no fraud as to plaintiff in the matter of the purchase of the lots in Dean's addition, and decreeing that the money in the hands of the receiver be applied—first, to satisfy the costs and expenses of the suit; second, to the discharge of the judgments of Hexter, May & Co. and D. M. Osborne & Co.; third, to the satisfaction of the judgment re-

covered by the plaintiff in the action wherein he caused said goods to be attached; and, fourth, to the payment of the judgments in favor of the Bridge & Beach Manufacturing Company and Baker & Hamilton. From this decree the hardware company and the plaintiff both appeal.

W. R. Willis, for appellants.

J. W. Bennett and *Wirt Minor*, for respondents.

BEAN, C. J. (after stating the facts).—In behalf of plaintiff, it is contended that the two lots in Dean's addition were purchased by the defendant Minott, and deeded to his wife, for the purpose of hindering, delaying and defrauding creditors; but it appears that the purchase was made before any of the debts involved in this suit were contracted, and, there being no evidence to show that Minott had the property deeded to his wife for the purpose of hindering, delaying or defrauding his subsequent creditors, the decree of the court below in that respect must be affirmed.

It is contended, in behalf of the hardware company, that the complaint in this suit is insufficient, because it does not allege the name of the court in which plaintiff's said action was brought, nor that the indebtedness upon which it is based was due and payable; but this objection comes too late after judgment. No such question was made in the court below. The allegation of the complaint is, in substance, that on the 22d day of October, 1892, the plaintiff commenced an action against the defendant Minott to recover the sum of \$3,884.62, interest, costs and disbursements, and caused the entire stock of hardware, tools, implements, stoves, tinware, iron, steel, merchandise and personal property of every description, transferred by the defendant Minott to the hardware company, to be duly attached by the sheriff of Coos county. This allegation of the complaint was denied by the answer, and the judgment roll in the action was admitted in evidence without objection, and it is

now too late to raise the question as to the sufficiency of the complaint in this respect.

It is next claimed that the complaint fails to allege that the hardware company knew of or participated in Minott's fraudulent scheme, but this contention is equally without merit. The complaint avers that Minott formed the corporation for the purpose and with the intent of hindering, delaying and defrauding his creditors, and that, ever since its formation, he has had full charge and management of its business, and has used it for the purpose of enabling him to carry on his business, and to cheat and defraud his creditors, and that, at all times since its organization, it has fraudulently transacted business and purchased goods in its own name, but for the use and benefit of Minott, and in furtherance of his fraudulent scheme, and that the stockholders "were fully aware of the objects and purposes for which the same was formed and for which its powers were exercised." In other words, the effect of the allegations is that Minott was the corporation, and the corporation was Minott, and that it was organized and used by him as a means of hindering and delaying his creditors. Under such circumstances, a court of equity will look through and beyond the legal forms in which the transaction was clothed, and, if his real object and purpose was to hinder and delay creditors, will declare the sale and transfer void as to them; and no rule of law which regards a corporation as an artificial person, separate and independent of its shareholders, can stand in the way of such a result.

It is next claimed that this suit cannot be maintained, because the complaint and evidence shows that the corporation was regularly and legally organized, and that Minott received, in exchange for his goods, their value in stock of the corporation, and therefore, it is argued, had as much property subject to execution and sale by his creditors after as before the transfer. But the conclusion is inevitable, from the evidence, that the corporation was organized by

Minott as a means of hindering and delaying pressing creditors in the collection of their claims, and therefore the transfer by him of the stock of goods to it was void as to creditors, and they are entitled to be protected against such a scheme by a court of equity. Under the proofs in this case, it is apparent that Minott was in fact the corporation, and the corporation was Minott. He caused it to be formed, was the president, general manager and treasurer, and owned practically all the subscribed stock at the time the pretended transfer was made. He made the contract therefor between himself as an individual and the corporation, acting for both parties, and conducted the business practically the same after as before the incorporation, using the proceeds for his own benefit. Under these circumstances, although the corporation was organized in due form of law, and has a valid corporate existence, the legal rules which regard it as an entity distinct from the real parties in interest, and its stock as property subject to sale under execution, must go down in this attempt to consummate a fraud by legal forms. Equity is not bound by the rules of law in this respect, when such rules will permit fraud to triumph. "In equity," says Mr. Morawetz, "the conception of the corporate entity is used merely as a formula for working out the rights and equities of the real parties in interest; while at law this figurative conception takes the shape of a dogma, and is often applied rigorously, without regard to its true purpose and meaning. In equity, the relationship between the shareholders is recognized whenever this becomes necessary to the attainment of justice:" Mor. Priv. Corp. § 227; *Railway Co. v. Miller*, (Mich.) 51 N. W. Rep. 981; *Gas Co. v. West*, 50 Iowa, 16; *Booth v. Bunce*, 33 N. Y. 139.

It is also contended that plaintiff had no standing to institute a suit of this character until his action in which the attachment was issued ripened into a judgment, and an execution thereon was returned unsatisfied. On the ques-

tion as to whether a creditor must reduce his claims to judgment before he can maintain a creditors' bill to reach assets of his debtor which have been transferred for the purpose of defrauding creditors, the authorities are not harmonious, but in this state it may be regarded as settled that a lien by attachment is sufficient for that purpose: *Dawson v. Sims*, 14 Or. 561, 13 Pac. Rep. 506; *Sabin v. Michell*, (Or.) 39 Pac. Rep. 635. But the suit is not grounded alone upon an attachment lien, but also upon the *Baker & Hamilton* judgment, assigned to plaintiff, upon which an execution was issued and returned unsatisfied; and, under all the authorities, this is sufficient to enable plaintiff to maintain the suit.

The contention is also made that, at the time of the formation of the corporation, and the transfer by Minott of his stock in the concern to his wife, about a month later, he was justly indebted to her in about the sum of \$10,000, and that such transfer was made in good faith in payment thereof. If this be true, it is not apparent how it can benefit the hardware company on this appeal. Mrs. Minott has not appealed, and the only question between the hardware company and the plaintiff is the validity of the sale and transfer by Minott of his stock of hardware to the corporation. If this sale was valid, and made in good faith, the plaintiff must fail in this suit, without regard to the disposition Minott may have made of his stock in the corporation. But, on the other hand, if it was made, as we think the evidence clearly shows it to have been, for the purpose of hindering and delaying creditors, then it is void as to them, and no subsequent disposition by Minott of his stock or interest in the corporation could give validity to the transaction. The existence of the corporation or the ownership of the stock can in no way be affected by the result of this suit. Whatever the result, the corporation survives, and Mrs. Minott will have the stock she claims to have purchased from her husband. Its value, it is true, will be

largely reduced, if not practically destroyed; but this result comes, not because of the want of good faith in the sale and purchase of the stock by her from her husband, but on account of a previous fraudulent transaction between the corporation itself and Minott. Under these circumstances, we do not regard it important to determine whether Minott was or was not indebted to his wife at the time he transferred the stock in the hardware company to her, because we regard the transaction by which the hardware company claims to have become the owner of the stock of merchandise owned by Minott at the time he contracted the debts upon which this proceeding is based as having been consummated for the purpose of hindering, delaying and defrauding creditors, and it must be declared void as to them.

The only remaining question in this case is one of priority between the plaintiff and defendants Hexter, May & Co. and D. M. Osborne & Co. Some question is made as to the execution of the writs of attachment in the actions brought by these defendants against Minott, but there seems to have been a substantial compliance with the statute in attaching the property under said writs, and, in our opinion, the order of distribution made by the court below ought not to be disturbed. It follows that the decree must be affirmed and it is so ordered.

INCORPORATION IN FRAUD OF CREDITORS.

If a person, or firm, in insolvent or failing circumstances, forms a corporation for the purpose of taking over his or its business, and transfers all his property to it for stock or bonds therein, the transaction is a fraud on his creditors, and they may set it aside: *Kellogg v. Douglas Co. Bk.*, (Kans.) 48 Pac. Rep. 587; *Terhune v. Skinner*, (N. J.) 19 Atl. Rep. 377; *Natl. Broadway Bk. v. Yuengling*, 58 Hun, (N. Y.) 474; *Gardner v. C. B. Keogh Mfg. Co.*, 63 Hun, (N. Y.) 519; and, in case of a partnership, since its assets are a trust fund for creditors, they may levy on them in the hands of the corporation to

which they have been transferred: *San Francisco & N. P. R. R. Co. v. Bee*, 48 Cal. 398; *Booth v. Bunce*, 33 N. Y. 139. It has also been held, that in such a case the corporation might be sued on an implied assumption of the debt: *Bremen Sav. Bk. v. Branch-Crookes Saw Co.*, 104 Mo. 425. In *Van Campen v. Ingram*, (N. J.) 12 Atl. Rep. 537, the defendant purchased a manufacturing business, taking an assignment of a lease from the Belvidere Manufacturing Company, the latter consenting to an assignment to him alone. Ten days later he procured a certificate of organization of the Pequest Manufacturing Company, and, without the consent of his lessor, transferred his interest in his purchase to that company, of which two others, who, with the defendant, were the nominal stockholders, were, without their consent, made president and secretary. The defendant took charge of all the business, paid all the expenses, and furnished all the capital. The Pequest Manufacturing Company had neither a place of business, books of account nor stock-book. No stock was ever legally issued. Upon these facts, it was held that the transaction was fraudulent, and that a perpetual injunction would issue in favor of an attaching creditor of the defendant, to prevent the Pequest Manufacturing Company from claiming any interest in the property. Further, a corporation cannot be regarded as a *bona fide* holder of a note of the partnership from which it was formed: *McElwee Mfg. Co. v. Trowbridge*, 62 Hun, (N. Y.) 471. But there is no presumption of fraud from the mere fact of the transfer of property by a person or a partnership to a corporation organized by him or its members, since a solvent person can do what he pleases with his property, as long as he does not impair his creditors' security: *Sayers v. Tex. Land & Mtge. Co.*, 78 Tex. 244; and accordingly, in *Coaldale Coal Co. v. Natl. State Bk. of Camden*, (Pa.) 21 Atl. Rep. 811, where a solvent mercantile firm transferred their business and all their property to a corporation of which the members of the firm were the stockholders, and afterwards pledged most of their stock to secure certain creditors, it was held that the transaction was not a fraud on the unsecured creditors.

REORGANIZATION IN FRAUD OF CREDITORS.

A conveyance of its assets by a corporation in fraud of creditors is void as against them, equally as in the case of such a conveyance by a natural person; and may be set aside at their suit: *Curran v. Arkansas*, 15 How. 304; *R. R. Co. v. Howard*, 7 Wall. 392; *Graham v. R. R. Co.*, 102 U. S. 148; *Wabash, St. L. & P. R. R. Co. v. Ham*, 114 U. S. 587; *Chicago, M. & St. P. Ry. Co. v. Third Natl. Bk.*, 134 U. S. 276; *Goodin v. Cincinnati & Whitewater Canal Co.*, 18 Ohio St. 169; *Vance v. McNabb Coal & Coke Co.*, 92 Tenn. 47; and since the introduction of the doctrine that the assets of the corporation are a trust fund for the payment of creditors, such assets may be followed, like any other trust funds, into the hands of a holder with notice: *Williams v. Colby*, 6 N. Y. Suppl. 459; see *Warner v. Stebbins*, (Mich.) 47 N. W. Rep. 102. Accordingly, when one corporation transfers all its assets to another corporation, without consideration and without paying its debts, the purchaser takes the property subject to an equitable lien in favor of the creditors of the vendor: *In re Empress Engineering Co.*, 16 Ch. D. 125; *Hibernia Ins. Co. v. St. L. & N. O. Transp. Co.*, 13 Fed. Rep. 516; *Harrison v. Union Pac. Ry. Co.*, 13 Fed. Rep. 522; *Brum v. Merchants' Mut. Ins. Co.*, 16 Fed. Rep. 140; *Fogg v. St. Louis R. R. Co.*, 17 Fed. Rep. 871; *Blair v. St. Louis, H. & K. R. R. Co.*, 24 Fed. Rep. 148; *Leathers v. Janney*, 41 La. An. 1120; *Heman v. Britton*, 88 Mo. 549; *Natl. Bk. v. Texas Inv. Co.*, 74 Tex. 421; but this rule does not apply when the sale is for a full consideration; *e. g.*, the assumption and payment of the mortgage debts of the old corporation to the full value of the property conveyed: *Warfield v. Marshall County Canning Co.*, 72 Iowa, 666. Yet if the effect of the transfer is to dissolve the transferor, it will still be void if the only consideration is the assumption of its debts: *Cole v. Millerton Iron Co.*, 133 N. Y. 164. As a consequence of these principles the reorganization of a corporation, especially if insolvent, and the transfer of its property to the new corporation, without paying the debts of the old, or making provision for their payment, is a fraud upon its creditors, though the transfer be for a valuable

consideration, and will be set aside; or, at the option of the creditor, the new corporation, if a mere successor of the old, under a changed name, will be held liable for its debts, to the extent of the assets received: *Hibernia Ins. Co. v. St. L. & N. O. Transp. Co.*, 13 Fed. Rep. 516; *Brum v. Merchants' Mut. Ins. Co.*, 16 Fed. Rep. 140; *Blair v. St. L., H. & K. R. R. Co.*, 22 Fed. Rep. 36; *Martin v. Zellerbach*, 38 Cal. 300; *San Francisco & N. Pac. R. R. Co. v. Bee*, 48 Cal. 398; *McVicker v. American Opera Co.*, 40 Fed. Rep. 861; *Berry v. Kansas City, Ft. S. & M. R. R. Co.*, 52 Kans. 774; *Polar Star Lodge No. 1 v. Polar Star Lodge No. 1*, 16 La. An. 53; *Island City Sav. Bk. v. Sachtleben*, 67 Tex. 420; and the assets may be taken in execution as the property of the old corporation: *Booth v. Bunce*, 33 N. Y. 139. So, when a corporation is reorganized so as to create a new corporation, instead of merely reviving and continuing the old one, though the new corporation will not be liable at law for the debts of the old one, yet the creditors of the old corporation may pursue its assets into the hands of the new corporation, as a trust fund, and subject them to the payment of their debts: *R. R. Co. v. Howard*, 7 Wall. 392; *Agricultural Society v. Hunter*, 110 Ill. 155; *Von Glahn v. De Rosset*, 81 N. C. 467; *Railroad Co. v. Rollins*, 82 N. C. 523; *Dobson v. Simonton*, 86 N. C. 492; *Marshall v. Western N. C. R. R. Co.*, 92 N. C. 322; and when a new corporation is organized by the sanction and concurrence of the officers of another corporation for the express purpose of acquiring its property, and the transfer of the property is accomplished mainly through the efforts of those officers, who in the meantime have become directors in the new corporation, the only consideration for the transfer being an agreement by the new corporation to issue to the old a small part of its stock, the transaction is void as against the creditors of the old corporation: *Vance v. McNabb Coal & Coke Co.*, 92 Tenn. 47. Moreover, even when the consideration of the transfer is an assumption of the debts of the old corporation, thereby making it valid, if one creditor is excepted from that assumption, the transfer is a fraud as to him, and he can follow and levy on the property in the hands of the new corporation: *Montgomery Web Co. v. Dienelt*, 133 Pa. 585.

Reorganization—Deposit of Bonds—Lien—Non-assenting Bondholders.

MOWRY v. FARMERS' LOAN & TRUST CO.

(Circuit Court of Appeals, Seventh Circuit. October 5, 1896.)

(76 Fed. Rep. 38.)

A reorganization agreement, providing for the refunding of securities, authorized a committee to carry out the reorganization, and recited that it would probably not be necessary to sell the railroad, and disclaimed any power to affect the interests of non-assenting bondholders; and the mortgage made in accordance with the agreement to refund the securities provided that the bonds deposited under the agreement in exchange for the new securities should be held by the trustee under the mortgage as additional security for the benefit of the holders of the bonds secured thereby, and that upon delivery to the trustee of the bonds of any one issue still outstanding the mortgage securing them might be cancelled. *Held*, that the bonds deposited under the agreement were not extinguished, so as to leave the non-assenting bonds the only outstanding debt secured by the existing mortgages.

A clause of the reorganization agreement provided that a certain branch road, which was not remunerative, should be sold, the proceeds to be applied as the committee might determine. Such branch road was excepted from the new consolidated mortgage, but was not sold, owing to the failure of the reorganization, arising from the non-assent of certain bondholders. *Held*, that the assenting bondholders did not waive their lien upon such branch road in favor of the holders of the non-assenting bonds.

The deposit of bonds by the holders with a trust company under a reorganization agreement, to be held by it as security, or other bonds then issued by the railroad company, is not a reissue of the bonds, so as to be affected by Rev. St. Wis. § 1753, providing that no corporation shall issue bonds except for money, labor or property equal to seventy-five per cent. of their par value.

On appeal from the Circuit Court of the United States for the Eastern District of Wisconsin.

On the 1st day of September, 1881, the Green Bay, Winona & St. Paul Railroad Company executed to the

Farmers' Loan & Trust Company a mortgage or trust deed to secure the payment of bonds amounting to \$1,600,000. This mortgage covered the main line of railroad in Wisconsin, extending from Green Bay to the western terminus at Eastmoor, on the east bank of the Mississippi river, and a branch road extending from Onalaska to La Crosse, together with certain real estate in the last-named city. The bonds secured by this mortgage or trust deed were payable February 1, 1911, and bore interest at six per cent. per annum, payable semi-annually on February 1 and August 1. Default was made in the payment of the interest due August 1, 1888, and thereafter, on the 31st day of July, 1890, the trustee, by virtue of a provision in the trust deed, and being thereto requested in writing by the holders of one-fourth of the bonds secured by the mortgage or trust deed, took possession of the railway mortgaged, and entered upon the operation thereof; and thereafter, on the 1st day of August, 1890, filed its bill of complaint in the court below, setting forth the facts, and alleging the insolvency of the defendant railway corporation, and prayed that the trustee might be affirmed in its possession under the provisions of the trust deed, and that it be appointed receiver of the mortgaged premises, and might be instructed by the court from time to time with respect to the proper mode of fulfilling the provisions of its trust, that the amount due upon the bonds might be ascertained, and the property be sold in one parcel, and applied to the mortgaged debt. Upon filing the bill a decree was entered affirming the possession of the trustee, and appointing it receiver of the road, and thereafter and hitherto it has continued as its receiver.

In the year 1892 certain owners of the bonds sought to refund the indebtedness of the company. This refunding agreement was assented to and participated in by all of the first mortgage bondholders, with the exception of those owning one hundred and five of such bonds. This agree-

ment is in form a contract between three individual trustees, named, and such bondholders and stockholders of the railroad company as should deposit their respective holdings thereunder. It recited that there was outstanding \$10,000,000 of common and preferred stock, \$3,371,000 income bonds, refunded interest and first mortgage bonds, and \$70,000 Green Bay, Stevens Point & Northern Railroad bonds. It provided that there should be issued, upon reorganization, the following securities: Consolidated five per cent. mortgage bonds, \$2,500,000; second mortgage bonds, \$3,781,000; non-cumulative preferred stock, \$2,000,000; common stock, \$8,000,000. The new consolidated bonds were to be used to take up at par the existing first mortgage bonds and unpaid coupons, the funded coupon bonds and unpaid coupons at par, and for other purposes. The holders of outstanding bonds were required to deposit their securities with the trust company, to be held and used for purposes of refunding under this plan, and temporary certificates were to be issued for securities so deposited. Clause X of the agreement provides: "It is not deemed probable that it will be necessary to carry out the contemplated reorganization agreement by a sale of the mortgaged premises under foreclosure. Nevertheless, any power to affect hereby the rights and interests of non-subscribers is hereby expressly disclaimed; this agreement being made subject to any and all such rights and interests, whatever they may be." The agreement also conferred upon the committee "whatever power and authority it may be necessary for them to exercise in order to enable them legally and efficiently to execute such trust and carry out the reorganization herein contemplated," and by the fourth article declared: "Inasmuch as the branch line, seven miles in length, from Onalaska to La Crosse is twenty-two and one-half miles distant from the main line of the railroad, and its operation involves a net loss to the railroad company, therefore it is agreed that the said branch line and all

property appurtenant to the same, and any and all other property, in the judgment of the committee, not needed for the operation of the railroad, may be sold at such time and in manner as the committee may determine, free of all claims of the subscribers and of the mortgage trustee, the proceeds to be applied as the committee may determine." The committee were to be the agents and trustees of the depositing bond- and stockholders, and all bonds and shares of stock lodged in pursuance of the agreement were to be held by it, subject to the order of the committee, for carrying out the purposes of the agreement.

This reorganization agreement was signed and executed by holders and owners of bonds secured by the first mortgage to the amount of \$1,495,000 of principal, and of coupons in arrears to the amount of \$334,320, by holders of bonds secured by the funded coupon agreement of the Green Bay, Winona & St. Paul Railroad Company, dated August 2, 1886, to the amount of \$276,770 of principal, and coupons thereof in arrears to the amount of \$58,275, by holders of bonds secured by the first mortgage of the Green Bay, Stevens Point & Northern Railway Company to the amount of \$69,000 of principal, and coupons to the amount of \$12,075. In pursuance of this refunding agreement, and on August 1, 1892, the railroad company executed and issued its consolidated mortgage bonds of \$1,000 each, aggregating the sum of \$2,378,828, payable February 1, 1911, bearing interest at five per cent. per annum, payable semi-annually on February and August 1st in each year, and, to secure the same, executed a certain consolidated mortgage or deed of trust, conveying to the Farmers' Loan & Trust Company the railway and its appurtenances, and provided by Article XI as follows: "\$1,600,000 (one million six hundred thousand dollars) of said bonds shall be used in exchange for outstanding bonds secured by the first mortgage of the Green Bay, Winona & St. Paul Railroad Company to the Farmers' Loan & Trust Company,

dated September 1, 1881, and shall be issued and delivered over by the trustee on the delivery to it of such outstanding bonds, dollar for dollar. \$336,000 (three hundred and thirty-six thousand dollars) of said bonds shall be used in exchange for unpaid coupons of the said first mortgage bonds, secured by said mortgage of September 1, 1881, and shall be issued and delivered over by the trustee on the delivery to it of such unpaid coupons, dollar for dollar. \$280,830 (two hundred and eighty thousand eight hundred and thirty dollars) shall be used in exchange for outstanding funded interest bonds secured by the mortgage of the Green Bay, Winona & St. Paul Railroad Company to the Farmers' Loan & Trust Company, dated August 2, 1886, and shall be issued and delivered over by the trustee on the delivery to it of such outstanding funded interest bonds, dollar for dollar. \$50,549.40 (fifty thousand five hundred and forty-nine dollars and forty cents) of said bonds shall be used in exchange for unpaid coupons of the said funded interest bonds, secured by said mortgage of August 2, 1886, and shall be issued and delivered over by the trustee on the delivery to it of such unpaid coupons, dollar for dollar. \$70,000 (seventy thousand dollars) of said bonds shall be used in exchange for outstanding first mortgage seven per cent. bonds secured by the mortgage of the Green Bay, Stevens Point & Northern Railroad Company to the Farmers' Loan & Trust Company, dated August 15, 1882, and shall be issued and delivered over by the trustee on the delivery to it of such outstanding first mortgage seven per cent. bonds, dollar for dollar. \$4,900 (four thousand nine hundred dollars) of said bonds shall be used in exchange for unpaid coupons of the said first mortgage seven per cent. bonds secured by said mortgage of the Green Bay, Stevens Point & Northern Railroad Company, and shall be issued and delivered over by the trustee on the delivery to it of such unpaid coupons, dollar for dollar. \$157,720.60 (one hundred and fifty-seven thousand seven hundred and

twenty dollars and sixty cents) of said bonds shall be at once certified and delivered over to the mortgagor railroad company on its order. The seven per cent. bonds secured by the mortgage of the Green Bay, Stevens Point & Northern Railroad Company, on being received in exchange as aforesaid, shall not be cancelled, but shall be held by the trustee under this mortgage as an additional security for the benefit of the holders of the bonds secured by this mortgage. The bonds and coupons of prior issues of the Green Bay, Winona & St. Paul Railroad Company, received as above set forth, shall be held by the trustee under this mortgage as additional security for the benefit of the holders of the bonds secured hereby. But when the bonds and coupons outstanding of any one issue shall have been delivered over to the trustee, then the mortgage securing such bonds so delivered over, and for which bonds have been received in exchange as aforesaid, may, on the request of the railroad company, be cancelled: provided, however, that no mortgage shall be cancelled under the provisions hereof until the mortgage by the party hereto of the first part to the party hereto of the second part, known as the 'second income mortgage,' and dated September 1, 1881, shall have been previously satisfied and discharged."

This refunding agreement was sought to be carried into effect by the execution and delivery of new bonds and of a new mortgage. The trustee received the old securities of the company to the amount of the new bonds issued to the assenting bondholders. The railroad continued in the management of the receivership, however, and under it and through the aid of the refunding proposed a large quantity of steel rails were purchased, and the road and rolling-stock much improved, prior to the panic of the year 1893. It thereafter appeared that the refunding scheme could not be carried out effectually, and in part because of non-assent of bondholders holding the 105 bonds represented here by the appellant. On March 1, 1895, William S.

Mowry, the appellant, filed his bill in the court below as holding or representing the 105 non-assenting bonds, and sought the foreclosure of the first mortgage upon the road, and claimed that by participating in the reorganization agreement, and accepting consolidated bonds issued pursuant thereto, the 1,495 first mortgage bonds had become extinguished, leaving the 105 non-assenting bonds the only bonds secured by the first mortgage, and entitled to be first paid out of the proceeds of the mortgaged property. On the 5th day of March, 1895, the Farmers' Loan & Trust Company filed an amended and supplemental bill for the foreclosure of the second mortgage, and on the 10th day of April following filed a second amended and supplemental bill to foreclose the consolidated mortgage. On October 16, 1895, it filed an amendment to its amended and supplemental bill of March 5, 1895, and prayed for foreclosure and sale upon all the mortgages. These causes, by order of the court, were all consolidated. On the 14th day of November, 1895, the court, upon the motion of the Farmers' Loan & Trust Company, entered a decree of foreclosure and sale. This decree found that the entire issue of \$1,600,000 of first mortgage bonds were outstanding in the hands of *bona fide* holders for value. The income mortgage of September, 1881, was adjudged to be a second lien, and the sum of \$89,000 of outstanding consolidated bonds were adjudged to be a third lien, and \$3,692,000 of new income bonds issued under the plan of reorganization was decreed to be a fourth lien. It was also decreed that the \$1,495,000 of first mortgage bonds and coupons deposited with the trust company to secure the bonds issued under the consolidated mortgage were not extinguished, but remained in full force and effect, and retained unimpaired the lien security provided by the first mortgage of September 1, 1881, except that the plan was treated as an agreement with the holders of the deposited \$1,495,000 of bonds to accept an interest after August, 1892, at the reduced rate of five per cent. per annum. The

decree further provided that upon the sale of the road, except as to a certain cash deposit and such sums as the court should require to discharge preferential claims, the balance of the accepted bid might be paid in money, or in first mortgage bonds and coupons, or in consolidated bonds and coupons; "each of the said first mortgage bonds and coupons to be taken at such price or value as the holder thereof would have been entitled to receive on the distribution of the proceeds of sale in case the entire amount of the bid had been paid in money, and each of such consolidated bonds and coupons to be taken at such price or value as the holders thereof would have been entitled to receive on the distribution of the proceeds of sale in case the entire amount of the bid had been paid in money, reckoning each of such consolidated bonds and coupons at an amount equal to the *pro rata* share of the holder of such consolidated bonds in the amount which would be payable out of the proceeds of the sale hereunder in case the entire amount of the bid had been paid in money, upon the first mortgage bonds and coupons deposited with the Farmers' Loan & Trust Company, as trustee, under the consolidated mortgage, in exchange for the issue of consolidated bonds, including the amount of first mortgage coupons deposited in exchange for funded coupon bonds, and which funded coupon bonds were thereafter exchanged for consolidated bonds, together with such sum as the holder thereof would be entitled to receive under the distribution herein ordered, and according to the priority of the said consolidated bonds herein adjudged." To this decree William S. Mowry, the appellant, filed assignments of errors, and from it has appealed to this court.

Henry Crawford, for appellant.

Edward P. Vilas and *Geo. W. Wickersham*, for appellees.

Before WOODS, JENKINS and SHOWALTER, Circuit Judges.

JENKINS, C. J., after this statement of the case, delivered the opinion of the court.

Since this cause came to this court provision was made, by order of this court, which would permit the complainant in the original decree to proceed to a sale of the railway thereunder, and providing that an amount should be paid into the court on the sale, which would fully protect the appellant here in case his claim should be sustained. We need not, therefore, stop to consider the various assignments of error which deal with certain alleged irregularities in the entry of the decree and its subsequent modification. The only matter with which we need concern ourselves is the contention of the appellant that by reason of the reorganization agreement and the proceedings thereunder, the 1,495 assenting bonds were paid by the exchange for the new bonds issued under the consolidated mortgage, leaving the 105 non-assenting bonds the only outstanding debt secured by the first mortgage, and that the appellant, as the holder of these non-assenting bonds, is entitled to have them first paid out of the proceeds of the sale and in priority to the assenting bonds. Whether this contention be well founded or not must, in large measure, depend upon the intention of the parties. It is manifestly true that it is possible that one holding bonds secured by a prior mortgage can so surrender them in exchange for bonds secured by a subsequent mortgage that he will lose any right to the higher security. The question must be resolved in each case upon the facts of the particular transaction. Where a novation is thus sought to be established, it must be shown that the substitution of the new obligation was with design and intent to extinguish the old obligation; and as such an act would, upon its face, appear to be against the interest of the holder of the bond, such intent will not be presumed, but must be clearly established. A mere change in the form of the mortgaged debt, such as the substitution of new bonds for those originally secured by it, would not extinguish or affect the lien: *Stevens v. Railway Co.*, 8 L. R. Ch. App. 1064. But where the new bonds are secured by a new

mortgage, and the old bonds are surrendered to the debtor, generally a *prima facie* case would be established of novation, when no purpose of the parties appeared to retain the elder security : Jones, Corp. Bonds, §§ 319, 320. The scheme of reorganization here involved is manifested by the agreement between the assenting bondholders and stockholders and their trustee or committee, and by the concurring act of the railroad company, manifested by the mortgage issued by it to effectuate the scheme. It was clearly expected that all the bondholders under prior mortgages and the stockholders would unite in this plan of reorganization; and yet, recognizing what oftentimes, and perhaps generally, occurs in the reorganization of railways, that some of the bonds might not be found, or that some holders would not assent to the scheme of reorganization, provision would seem to have been made to guard against just such a contingency, and to prevent the inequitable result which will follow if non-assenting bondholders should, by means of and through the reorganization to which they would not agree, obtain, with respect to the non-assenting bonds, a decided and inequitable advantage over assenting bondholders, who theretofore stood with them upon an equal plane. This thought, possibly, is not specifically expressed in the refunding agreement, but the committee was therein authorized to exercise all necessary power to efficiently execute the trust and to carry out the reorganization; and the agreement recites that it was not deemed probable that it would be necessary, in order to effect the contemplated reorganization, that there should be a sale of the mortgaged premises under foreclosure, and it disclaimed any power to affect the rights and interests of non-assenting bondholders, and that the agreement was made subject to such rights and interests as they might have. The committee was also empowered to supply any defects and omissions in the agreement, and which it would be necessary to supply to carry out the purposes and objects of the plan; and any new

bonds or mortgages necessary or expedient for that purpose should contain such provisions and contracts, not inconsistent with the agreement, as might be approved by the railroad company and by the trust company to whom the mortgage might be made. These provisions clearly indicate that the discretion was lodged with the committee of the assenting bondholders to protect their rights in the consummation of the plan, and to insist upon such provisions as might be necessary to safeguard their interests. We therefore naturally find in the consolidated mortgage a provision that the bonds and coupons of prior issues of the railroad company received in exchange should be held by the trustee under the consolidated mortgage as additional security for the benefit of the holders of the bonds secured thereby, and that, when the bonds and coupons outstanding of any one issue should have been delivered over to the trustee, then the mortgage securing such bonds so delivered over, and for which bonds had been received in exchange, should, on request of the railroad company, be cancelled, and that no mortgage should be cancelled until the second income mortgage had been satisfied and discharged. It is manifest that at this time the non-assent of certain bondholders was known to the committee of the railroad company and the trust company; that it was hoped that they might be induced to concur, but that, in anticipation of non-concurrence, provision must be made to maintain the equitable position and the parity of relation which the bondholders bore to each other, and that it was not designed that the bonds should be surrendered and exchanged in satisfaction of the mortgage debt, but that there should be reservation of the security attaching to the elder bond. There was, in fact, no surrender of these bonds to the railroad company; nor, indeed, can it properly be said that there was completed substitution. The legal effect of the transaction was that the assenting bondholder received the consolidated bond and held the prior bond, keeping both alive

until the satisfaction of prior mortgages. This position is not weakened by the fact that the prior bond was delivered into the custody of the bondholders' trustee to hold for him and for his security until the final consummation of the plan of reorganization and the satisfaction of all prior mortgages, and until the consolidated bond should be the first and only lien upon the property. This was not a substitution of securities. It was an additional security, and "addition is not substitution:" *Bag Co. v. Van Nortwick*, 9 U. S. App. 25, 3 C. C. A. 274, and 52 Fed. Rep. 752.

The appellant comes demanding of a court of equity that it shall exercise its equitable powers to compass an inequitable result. Holding a minority of the bonds, he declined to enter into this plan of reorganization. That he had a right to do; but he has no right, either moral, equitable or legal, to say that through his non-assent he shall obtain so inequitable an advantage over the assenting bondholders. A court of equity would be slow to so construe any agreement of reorganization that it would work such unjust result. We find nothing in this agreement or in the act of the parties thereunder which even tends to that conclusion. The understanding seems to us to be express that the first mortgage, and the bonds issued thereunder, should be kept alive until all interests prior to the consolidated mortgage should be finally merged in the latter security, and all interests stand upon an equality of security under the plan of reorganization. We cannot entertain a construction of this agreement which would enlarge the rights of the appellant. There was no contract or agreement with him, and the contract between the assenting bondholders and the railroad company clearly contemplated the continued existence of prior securities. It was contemplated that to fully effectuate the reorganization it might be necessary to foreclose the prior mortgage, and, as observed by Judge WALLACE, in *Barry v. Railway Co.*, 34 Fed. Rep. 829, 833, when it became necessary to enforce the mortgage securing the non-

assenting bonds, "complete equity is done them if they are awarded the same share of the proceeds of the property which they would have received if no bonds had been surrendered." The conclusion we have reached is fully sustained in *Ames v. Railway Co.*, 2 Woods, (U. S.) 206, Fed. Cas. No. 329; *Fidelity Insurance, Trust & Safe Deposit Co. v. Shenandoah Val. R. R. Co.*, 86 Va. 1, 9 S. E. Rep. 759; *Ketchum v. Duncan*, 96 U. S. 659. The case of *Union Trust Co. v. Illinois M. Ry. Co.*, 117 U. S. 434, 6 Sup. Ct. Rep. 809, is in no wise inconsistent. There was no contingency and no reservation on the part of those surrendering. As the court states, the surrender was for cancellation. That was a case of novation pure and simple.

Alike unfounded is the contention of the appellant that the court below erred in decreeing that the lien of the assenting bonds upon the La Crosse branch still existed, and that they should share in the proceeds arising from the sale of that branch. It is not correct to say that this branch road was, by the refunding agreement, or by any acts done thereunder or in pursuance thereof, released from the lien of the first mortgage. The clause of that agreement upon which the claim is rested merely provides that, as that branch road had no connection with the main line, and its operation was non-remunerative, and was not essential to the operation of the main line, the branch line should be sold when and as the committee should determine, and might be so sold free and discharged of all claims of the assenting bondholders, and that the proceeds should be applied as the committee might determine. It was not so sold. It is true that this branch road was not included in, and was expressly excepted from, the consolidated mortgage, and this was because, manifestly, that that mortgage was executed in contemplation of the success of the refunding scheme, which designed a sale of the branch line and the appropriation of the proceeds to the uses of the main line, or for the benefit of the bondholders. That could not

have been accomplished without the assent of all of the bondholders, and failed in consequence of the non-assent of some of them. The provision of the agreement was in aid of granting a clear title in the event of a sale, and was inoperative otherwise. It certainly was not within the purpose of the assenting bondholders to waive their security in favor of a stranger to the agreement, and surely a court of equity ought not to torture the language of the writing into an unconditional release of security, going to enrich a non-assenting bondholder.

It is further urged that the provision of the consolidated mortgage which authorized the trustee to hold the exchanged bonds and coupons as additional security for the benefit of the holders of bonds secured by the consolidated mortgage was an attempt to reissue, and a gratuitous pledge of the retired securities, within the prohibition of the statute: Rev. St. Wis. § 1753. This section is to the effect that "no corporation shall issue . . . any bonds or other evidences of indebtedness except for money, labor or property estimated at its true money value actually received by it, equal to seventy-five per cent. of the par value thereof, and all stocks and bonds issued contrary to the provisions of this section . . . shall be void." This statute was considered and applied in *National Foundry & Pipe Works v. Oconto Water Co.*, 52 Fed. Rep. 29, 36; *Pfister v. Railroad Co.*, 83 Wis. 86, 53 N. W. Rep. 27. It was held there that the object of the statute is to protect stockholders and *bona fide* creditors from improvident issue of bonds by a corporation, and that, when a corporation hypothecates its bonds as security for a loan, or for any other purposes, or in any other manner, it issues them within the meaning and intention of the statute; and, failing a stipulation that they shall be accounted for at not less than seventy-five cents on the dollar of their par value, the statute is violated, and the bonds are void. This exposition of the statute by the supreme court of Wisconsin is binding upon us, and, were

it not, we fully concur in the conclusion of that court. The writer of this thus construed and applied it in the case first cited, and before the decision by the supreme court of Wisconsin referred to. This case, however, does not fall within the statute. The first mortgage bonds were issued for value, and were valid obligations of the railroad company. They were never surrendered to that company, and consequently they were never reissued by that company. It was not contemplated that they should be surrendered until the happening of a contingency which has never occurred. They were deposited by the holders with the trust company, to be held by it as their security, or as security for other bonds then issued by the railroad company. The company, by this mortgage, assented to the transaction. This transaction is in no sense within the prohibition of the law, nor does it come within the mischief sought to be prevented by the statute in question.

The decree will be affirmed.

RIGHTS OF STOCKHOLDERS AND BONDHOLDERS ON REORGANIZATION.

1. Rights of Stockholders on Amicable Reorganization.—As a general rule, when the reorganization of a corporation is effected by amicable agreement among the stockholders, their rights in the new corporation remain the same as in the old, except in so far as they may be varied by the agreement; and the same is true in case of consolidation. They may demand stock of the new corporation: *Day v. Worcester, N. & R. R. Co.*, 151 Mass. 302; *India Mut. Ins. Co. v. Worcester, N. & R. R. Co.*, (Mass.) 25 N. E. Rep. 975; and when the agreement provides that stock of the new corporation shall be issued to the stockholders of the old, they may sue directly to compel the issue, though there is no contract with them personally: *Anthony v. American Glucose Co.*, 21 N. Y. Suppl. 667. So, when a corporation was reorganized under a condition that stock in it should be exchanged for stock in the new corporation, and pending a bill to compel the issue of such stock, the

new corporation assigned for the benefit of creditors, it was compelled to pay the highest market value of the old stock between the time when the new stock should have been issued and the assignment : *Reading Fire Ins. & Trust Co. v. Reading Iron Works*, 137 Pa. 282. But a stockholder who has not paid the full amount of his subscription cannot compel the issue of new stock to an amount greater than that actually paid : *Babcock v. Schuylkill & L. V. R. R. Co.*, 133 N. Y. 420. Under a statute that prescribes that on reorganization or consolidation a stockholder who refuses to convert his stock shall be paid its actual value, the failure of a stockholder to demand the value of his stock before consolidation or reorganization does not defeat his right. It is the business of the corporation to find out who so refuses, and ascertain the value of his stock : *Pittsburgh, C. & St. L. St. Ry. Co. v. Garrett*, 50 Ohio St. 405.

2. Rights of Stockholders on Forced Reorganization.—When the reorganization is the result of a foreclosure sale, the stockholders of the old corporation have no rights in the new, except in so far as the same may be given them by statute or agreement of the bondholders. Their rights are extinguished by the sale : *Thornton v. Wabash R. R. Co.*, 81 N. Y. 462 ; *Vatable v. N. Y., L. E. & W. R. R. Co.*, 96 N. Y. 49. The bondholders may, however, agree to permit the stockholders of the old corporation to receive stock of the new ; for such an agreement is based upon sufficient consideration : *In re Hill's Waterfall Estate & Gold Mining Co.*, [1896] 1 Ch. 947 ; and the stock of the old company may be assumed as a liability by the new : *Davidson v. Mexican Natl. R. R. Co.*, 42 N. Y. Suppl. 1015. But as this is a matter of grace on the part of the bondholders, they may impose whatever conditions they please ; *e. g.*, that the stockholders must pay a certain amount per share, on a basis which includes the liabilities assumed by the new corporation : *Carey v. Houston & T. C. Ry. Co.*, 45 Fed. Rep. 438 ; *Gernsheim v. Central Trust Co.*, 16 N. Y. Suppl. 127 ; and these conditions must be performed before the stockholders can claim the benefit of the agreement. Thus, in *Dow v. Iowa Central Ry. Co.*, 144 N. Y. 426, affirming 70 Hun, 186, railroad bondholders agreed, *inter se*, to purchase the road at a foreclosure sale and

reorganize it, and empowered a committee named to give to the holder of each share of stock in the old company a share in the reorganized company, on payment of \$15 a share. It was further provided that stockholders in the old company should be deemed to have declined such privilege after twenty days' notice, and that on failure to pay such sum the privilege of receiving the new stock should pass to certain other persons. The property was bought in, and the committee provided for payment in instalments. The holder of some of the old stock died after paying the first instalment, and the public administrator, who took charge of the estate, refused to pay the third instalment when due. The administrator subsequently sold the stock, and the purchaser demanded a transfer of new stock on payment of the assessments due; but this was refused, and he brought suit to compel the transfer. Under the circumstances, the court held that since the holder of the old stock had no rights in the property after foreclosure, or under the agreement, which was purely between the bondholders, the purchaser of the stock had no rights under that agreement, after default in payment of the assessments. Of course, the stockholders may attack any scheme of reorganization which is fraudulent as to them, but this cannot be done by one who has bought stock after the plan of reorganization was adopted and partly carried out, nor by those who have assented to it as to part of their stock; nor will such a plan be set aside on the ground that the officers of the old corporation failed to assess the stock to prevent foreclosure: *Symmes v. Union Trust Co.*, 60 Fed. Rep. 830; nor on any ground, when the calamity was inevitable and the complainant does not offer to do equity: *Carey v. Houston & T. C. Ry. Co.*, 52 Fed. Rep. 671; and a reorganization by refunding the bonded debt of the corporation at a lower rate of interest, and permitting the stockholders to retain their stock on payment of a *pro rata* share of the floating debt, is no fraud upon them: *Carey v. Houston & T. C. Ry. Co.*, 45 Fed. Rep. 438.

3. Rights of Bondholders upon Foreclosure.—As far as the foreclosure suit is concerned, the trustee named in the mortgage represents all the bondholders, and they need not be made parties to the suit: *Farmers' Loan & Trust Co. v. Kansas City*,

W. & N. W. R. R. Co., 53 Fed. Rep. 182; but when there are several classes of bondholders, and their rights conflict, some of each class may be allowed to intervene as parties, even when the mortgage provides expressly that no bondholder shall institute suit to foreclose, except after refusal by the trustee to do so: *Farmers' Loan & Trust Co. v. Northern Pac. Ry. Co.*, 66 Fed. Rep. 169; *Farmers' Loan & Trust Co. v. Northern Pac. Ry. Co.*, 70 Fed. Rep. 423; *Farmers' Loan & Trust Co. v. Cape Fear & Y. V. Ry. Co.*, 71 Fed. Rep. 38; and the holder of bonds may also sue when the trustee is beyond the jurisdiction, and the mischief will probably be done before he returns, and there is also reason to believe that the trustee is incompetent: *Ettlinger v. Persian Rug & Carpet Co.*, 142 N. Y. 189. The holders of bonds not made parties to the suit, either personally or by trustee, can foreclose on their bonds as if the former sale had not been made: *Stevens v. Union Trust Co.*, 11 N. Y. Suppl. 268; and bondholders of a different mortgage from that foreclosed, who have been defrauded, may set aside the sale: see *Robinson v. Iron Ry. Co.*, 135 U. S. 522; or, if their lien has not been foreclosed, may redeem from the sale: *Simmons v. Taylor*, 38 Fed. Rep. 682.

The rights of the bondholders are fixed by the decree, and only gross laches will defeat those rights. In *Zebley v. Farmers' Loan & Trust Co.*, 139 N. Y. 461, reversing 18 N. Y. Suppl. 526, the decree authorizing a purchase of the mortgaged property by the trustee provided that on payment by any bondholder of his proportionate share of the expenses of the action, and certain other moneys directed by the decree to be paid in cash, the purchase should enure to the benefit of such bondholder. The trustee sold the property to a new corporation; and twenty-four years after, one of the bondholders, who had paid nothing, brought suit, tendering the amount due from him, alleging that the sale was made without his knowledge, and praying for an account. The court held that under the decree, payment of the due share of expenses was not a condition precedent; that it was sufficient to tender it in the bill; that the delay of twenty-four years before claiming the benefit of the decree was not, under the circumstances, sufficient laches to defeat the claim; and that the trustee must account.

4. Rights of Bondholders under Reorganization Agreement.—In general, all the bondholders must assent to a plan of reorganization; and any who dissent will not be bound thereby; but the legislature may enact by statute: *Canada So. Ry. Co. v. Gebhard*, 109 U. S. 527; *Olcott v. Powers*, 15 N. Y. Suppl. 263; or the mortgage may contain an express provision: *Sage v. Central R. R. Co.*, 99 U. S. 334; that the majority may bind the minority. When the agreement is adopted, the rights of the assenting bondholders depend upon it; and it must be strictly performed. If it provides for the issue of stock or bonds to the bondholders, the stock or bonds must be issued as provided, and if this is not done, specific performance will be granted to compel the issue of proper securities, and the new corporation will be enjoined from issuing other than those called for by the agreement: *Dester v. Ross*, 85 Mich. 370. If the corporation refuses to obey, after being ordered by the court to issue the proper securities, a money judgment against it is proper: *Indiana, I. & I. Ry. Co. v. Swannell*, 157 Ill. 616, affirming 54 Ill. App. 260; and a failure to pay a due share of the expenses of reorganization will not prevent a bondholder from enforcing the reorganization agreement: *Indiana, I. & I. Ry. Co. v. Swannell*, 157 Ill. 616, affirming 54 Ill. App. 260. But when the new corporation is capitalized at an amount far exceeding the foreclosure debt, the bondholders can only compel it to issue to them an amount of stock equal to the accrued cost to them, and it may retain the rest as treasury stock: *White v. Wood*, 129 N. Y. 527, reversing 13 N. Y. Suppl. 631; and if the reorganization committee is compelled to pledge the new securities to raise the cash necessary to effect the reorganization, it will not be compelled to deliver them as per the agreement. In such a case the members of the committee may buy these securities at a sale to pay off the loan, and enforce a lien thereon for the charges incurred by them; and they need not deliver them before suing the bondholders for an account: *Coppell v. Hollins*, 91 Hun, (N. Y.) 570. The bondholders are bound by the reorganization agreement, as against the corporation, as well as between each other; and when it plainly shows that the new securities to be issued shall extinguish the old bonds, the consummation of the scheme of reorganization is equivalent to a

payment of those bonds, and the holders of them have no claim upon the proceeds of the foreclosure sale as unsecured creditors, to the amount by which the sum realized falls short of the amount of the bonds: *Central Trust Co. of N. Y. v. Cincinnati, J. & M. Ry. Co.*, 58 Fed. Rep. 500.

5. Rights of Dissenting Bondholders.—Though the majority may bind the minority as to reorganization, they cannot thereby destroy their claim upon the property mortgaged to secure their debt. The latter may compel the new corporation to account to them for the property received from the old: *Brooks v. Vermont Cent. R. R. Co.*, 22 Fed. Rep. 211; without notifying the other bondholders of their dissent: *Phila. & Reading R. R. Co. v. Love*, 125 Pa. 488; and may prevent the trustee from diverting to the securities of the new corporation funds pledged to secure the mortgage: *Hollister v. Stewart*, 111 N. Y. 644. In Indiana, *I. & I. R. R. Co. v. Swannell*, 157 Ill. 616, affirming 54 Ill. App. 260, on the foreclosure of a railroad mortgage, the bondholders agreed that a trustee might bid in the property for the amount of costs and expenses; and that each bondholder should deliver his bonds to the trustee, and pay his proportionate share of the costs and expenses, and should share proportionately in the proceeds of any resale by the trustee. The trustee bid in the property, had the sale confirmed, and resold the property. One of the bondholders, who had deposited his bonds with the trustee, and paid his share of the costs and expenses, subsequently received back his bonds from the trustee, released him from further liability, and waived all rights obtained through him. He thereafter sued to enforce a trust in his favor against the property sold; and it was held that his action did not deprive him of this right, since his rights were not obtained through the trustee, but arose out of his previous ownership of the bonds. So, in *Fernschild v. D. G. Yuengling Brewing Co.*, 40 N. Y. Suppl. 1119, reversing 38 N. Y. Suppl. 119, a new corporation was formed as a reorganization of another, under an agreement for the transfer to it of the property of the old company in consideration of the assumption of the old company's debts, except the claims of non-assenting bondholders. A resolution authorizing the purchase was then adopted, and a bill of

sale was prepared, providing that the new company should assume all the debts of the old company, except certain bonds. The reorganization committee reported that they had procured a bill of sale of all the property, which was to be delivered on the assumption by the new company "of all said debts and obligations." The chairman of the committee stated that the old company transferred all its property in consideration that the new company should assume all the debts and obligations of the old company, in addition to those specified in the reorganization agreement. Thereupon a resolution was adopted that the new company assumed "all the debts, obligations and liabilities, of every kind and description," of the old company, "in addition to the bonds and other obligations mentioned in the agreement of reorganization." Upon these facts it was held that the obligation of the new company was to assume all the obligations of the old company, including its bonds. On the other hand, dissenting bondholders cannot claim any priority in the distribution of the cash consideration of a purchase of the property of the old corporation: *Bound v. South Carolina Ry. Co.*, 71 Fed. Rep. 53; and if they have promised to surrender their bonds, but fail to do so until after the reorganization, they cannot then claim the benefits of the reorganization agreement, or compel the delivery of new bonds to them: *Carpenter v. Catlin*, 44 Barb. (N. Y.) 75. Further, in a proper case, a dissenting bondholder will be compelled to join in the reorganization. In *Pollitz v. Farmers' Loan & Trust Co.*, 53 Fed. Rep. 210, a suit to collect certain railroad bonds according to the terms of the original mortgage, it appeared that all of the bonds of the company, except those belonging to the plaintiff, had been surrendered and exchanged pursuant to a reorganization agreement which he refused to accept; that by a judgment of the United States circuit court in Oregon the reorganization had been substantially confirmed; that the trustee of the bondholders was a party defendant to that suit, and fairly represented the rights of all; that the interests of ninety-nine per cent. of the bondholders demanded the judgment; that the court recognized the rights of the non-confirming bondholders by requiring the company to execute a bond of indemnity conditioned for the payment of their bonds;

and that the plaintiff could recover under that decree all that he was entitled to. A cross-bill was filed to compel the plaintiff to surrender his bonds, and receive new bonds in lieu thereof, according to the reorganization agreement; and it was held that his bill must be dismissed, and that he must surrender his old bonds and accept new ones, as provided in the agreement.

Corporations—Railroad Companies—Purchase of Stock of Competing Line—Rights of Minority Stockholders—Foreclosure of Mortgage—Right of Trustee to Sue.

FARMERS' LOAN & TRUST CO. v. NEW YORK & N. RY. CO.

(Court of Appeals of New York. October 20, 1896.)

(150 N. Y. 410; 44 N. E. Rep. 1043. Reversing 78 Hun, 213; 28 N. Y. Suppl. 933.)

When a railroad corporation purchases a majority of the stock of another corporation for the purpose of controlling its property, equity will not lend its aid to such stockholder by enforcing a mortgage, and decreeing a foreclosure against the property of the corporation, at the request of such stockholder, and to the manifest injury of the minority stockholders, and the destruction of their interests in the corporation.

In an action to foreclose a mortgage against a railroad company upon default in payment of interest, which was contested by certain of the stockholders, as in fraud of their rights, it appeared that a parallel and competing road had, for the avowed purpose of gaining control of the defendant corporation, purchased a majority of its bonds and stock, and had controlled the membership of its board of directors and the policy of the company; that the request for the foreclosure was made by such corporation, under the provisions of the mortgage, in pursuance of its plan to secure control. *Held*, that it was competent for the stockholders to show, as evidence that the foreclosure was in fraud of their rights, that such competing corporation had, after gaining control, purposely so managed the affairs of the defendant corporation as to reduce its income, and had diverted its funds, in order to cause a default in the payment of interest on the mortgage.

A mortgage given by a railroad company to secure the payment of its bonds provided that the trustee might foreclose whenever, in the ex-

ercise of its discretion, it should deem it to be for the interest of the bondholders and all others concerned, or when requested so to do by the holder of \$2,000,000 of the bonds thereby secured. A banking firm, representing that they held \$1,700,000 of the bonds, and that they represented the owners of over \$800,000 of the bonds, requested that the mortgage be foreclosed. It appeared that, in fact, the first-mentioned bonds were not owned by the firm, but that they belonged to another railroad company, which had also made a contract to purchase the other bonds named. *Held*, that the request was insufficient to justify a foreclosure.

The trustee, having based its right to bring action upon the request so made, cannot, upon the request being shown to be insufficient, maintain the action, under the clause providing for foreclosure in its own discretion.

Appeal from Supreme Court, General Term, Second Department.

Action by the Farmers' Loan & Trust Company, trustee, against the New York & Northern Railway Company and others. On their own motion, Artemus H. Holmes and Alfred R. Pick were made parties defendant. From a judgment of the general term affirming a judgment for plaintiff, (78 Hun, 213; 28 N. Y. Suppl. 933,) defendants Holmes and Pick appeal. .Reversed.

The action was brought to foreclose a second mortgage upon the property of the New York & Northern Railway Company, made by it, and given to the plaintiff, as trustee, to secure the payment of second mortgage bonds issued by that company, amounting to \$3,200,000. This mortgage was made in pursuance of a plan for the reorganization of the predecessor of the New York & Northern Railway Company. The interest on the bonds for the first four years was payable only out of the net income, and no interest became due under the mortgage until June 1, 1892. It provided that no foreclosure could be had until the expiration of one year after default in the payment of the interest, and that then the plaintiff might, and upon the written request of the holders of two millions in amount of such bonds should apply to a court having jurisdiction for

a foreclosure and sale of the mortgaged premises. The capital stock of the New York & Northern Railway Company consisted of \$3,000,000, par value, of common stock, and \$6,000,000, par value, of preferred stock, making a total of \$9,000,000. On July 20, 1893, Drexel, Morgan & Co., claiming to own a portion and to represent the holders of another portion of the second mortgage bonds, which together amounted to more than \$2,000,000, requested the plaintiff to take proceedings for the foreclosure of the mortgage, and, under a provision in it to that effect, to declare the whole principal and interest secured thereby to be at once due and payable. None of the original defendants interposed any defence; but on October 5, 1893, on their own motion, the appellants were made parties defendant in the action, and served an answer. The appellants are stockholders of the New York & Northern Railway Company, representing about twenty thousand shares of preferred and common stock, and appear in this action on their own behalf, and also on behalf of the holders of the other shares represented by them. In the answer, the appellants, with other defences, in substance, allege that this action was brought in pursuance of an unlawful plan and combination by and between the New York Central & Hudson River Railroad Company and others acting for it to render the stock of the New York & Northern Railway Company valueless, and to secure its property for the benefit of the New York Central & Hudson River Railroad Company; that the latter, in order to carry such plan into effect, purchased a large number of the second mortgage bonds, and also a majority of the stock of that company; that by virtue of its ownership of a majority of such stock, and preparatory to the foreclosure of the mortgage, it obtained and assumed control of the affairs of the New York & Northern Railway Company, by causing changes in its directory and officers, so as to make them favorable to the New York Central & Hudson River Railroad Company, thereby pre-

venting the New York & Northern Railway Company from saving its default in payment of the interest then due, and from taking measures for its safety, or from resisting the New York Central & Hudson River Railroad Company's scheme to acquire its property by such foreclosure; that the railroad of the New York & Northern Railway Company was a parallel and competing road with the New York Central & Hudson River Railroad, and that, by the means already referred to, the latter company sought to secure the property of the former through such foreclosure for its own benefit, and at a price much less than its true value; that this was rendered possible by its acquiring a majority of the stock of that company, and thereby being able to control the affairs of the New York & Northern Railway Company, and to so manage its business in collusion with its directors and officers that its obligations could not be met or its default made good; that such acts on the part of the New York Central & Hudson River Railroad Company were fraudulent and prohibited by the laws of the state; and that the written request to the plaintiff asking for a foreclosure did not comply with the terms and provisions of the mortgage, as the persons making the request were not at the time holders of \$2,000,000 of the bonds it was given to secure.

On the trial, the defendants introduced in evidence the following letters and papers:

"The New York Central & Hudson River R. R. Co. Principal Office. Albany, N. Y., March 18, 1893. Circular letter to the stockholders in respect of acquiring control of the New York & Northern Railway. The New York & Northern Railway extends from One Hundred and Fifty-fifth street, in the city of New York, occupying a line practically midway between this company's Hudson River Division and its Harlem Division, to Brewsters, on the line of the latter, a distance of about 60 miles. It has a fine bridge across the Harlem river, and has, within the bounds of the city of New York, 8 miles of a

hundred-foot roadway, and it owns 32 acres of terminal property, also within the bounds of the city. The relation and value of this line to this company is too well known to require explanation. To acquire the control of it will cost this company about \$4,000,000, and agreements in respect thereof have been entered into subject to the approval herein asked for. It is proposed, after the control is acquired, to enter into a lease with the present company, or perhaps with a company to be organized in its stead, under which this company will guaranty the principal and interest of \$5,000,000 in 4 per cent. 100-year gold bonds. Of this amount \$4,000,000 will represent the cost of control, as above stated, and \$1,000,000 will be reserved for developing, improving and bettering the line. As will be seen by the form of notice at the top hereof, a special meeting of the stockholders of this company has been called, to be held on the 19th day of April next, to which meeting this matter will be submitted for approval and authorization. Accompanying this is the form of a proxy to be used at that meeting, which, when executed, may be returned to the undersigned in the same envelope with the proxies for other meetings which are sent herewith. What has been said in the other circular letters which go out with this in respect of the desirability of a full vote may be taken to apply, with equal force, to this present letter. E. D. Worcester, Secretary."

"New York, April 3, 1893. Drexel, Morgan & Company. E. V. W. Rossiter, Esq., Treasurer New York Central & Hudson River Railroad Company, Grand Central Depot, New York—Dear Sir: We have paid out for the New York Central as follows :

\$1,700,000 second mortgage bonds, at 80, . . .	\$1,360,000
2,500,000 preferred stock, at 35,	875,000
2,200,000 common stock at 15,	330,000
	<hr/>
Total,	\$2,565,000

"Will you kindly send us your note dated April 1 for that amount, and oblige yours truly, Drexel, Morgan & Company.

"P. S.—Equipment obligations and floating-debt obligations have not yet been delivered. We will report later as to them. D., M. & Co."

"New York, April 1, 1893. \$2,565,000. On demand, upon ten days' notice after date, we promise to pay to the order of Drexel, Morgan & Company two million five hundred and sixty-five thousand dollars, with interest. Value received. New York Central & Hudson River Railroad Company. Chauncey M. Depew, President. E. V. W. Rossiter, Treasurer."

The indorsements were: August 1, 1893, interest paid to date; also, \$740,996 on account of principal of within. Also further indorsements of full payment, August 1, 1893, for \$1,804,094.89.

"New York, April 5, 1893. E. V. W. Rossiter, Esq., Treas'r N. Y. C. & H. R. R. R. Co., City—Dear Sir: In payment for the following securities of the N. Y. & Northern R. R. Co., viz., \$1,700,000 2d Mtge. bonds, \$2,500,000 preferred stock, \$2,200,000 common stock, we have received from you a demand note, on ten days' notice, for \$2,565,000, dated April 1, 1893, and signed by Chauncey M. Depew, president, and E. V. W. Rossiter, treasurer of the N. Y. Central & H. R. R. R. Co. We hold the above-mentioned securities subject to your order. Yours very truly, Drexel, Morgan & Co."

The following is a resolution of the stockholders of the New York Central & Hudson River Railroad Company, which was adopted at a stockholders' meeting held April 19, 1893:

"Resolved, That the stockholders of the New York Central & Hudson River Railroad Company hereby approve and authorize the acquirement, by purchase, of a controlling interest in the stock and bonds of the New York

& Northern Railway Company, and approve and authorize the making of a lease with the company, or a company which shall be organized in its stead, of its railroad and property, and approve and authorize the guaranty under such lease of the principal and interest of \$5,000,000 in the four per cent. one hundred-year gold bonds of the lessor company."

The report of the New York Central & Hudson River Railroad Company to its stockholders, made June 4, 1893, was as follows:

"At a special meeting held April 19, 1893, 640,378 shares of the capital stock of this company were voted in favor of a resolution approving and authorizing the acquirement, by purchase, of a controlling interest in the stock and bonds of the New York & Northern Railway Company, and approving and authorizing the making of a lease with that company (or a company which shall be organized in its stead) of its railroad property, and approving and authorizing the guaranty under such lease of the principal and interest of \$5,000,000 in four per cent. one hundred-year gold bonds of the lessor company."

The following note was also introduced in evidence:

"August 1, 1893. \$1,824,094. On demand, upon ten days' notice after date, we promise to pay to the order of Drexel, Morgan & Company, one million eight hundred and twenty-four thousand and ninety-four dollars, with interest. Value received. New York Central & Hudson River Railroad Company. Chauncey M. Depew, President. E. V. W. Rossiter, Treasurer."

The indorsements upon this note showed payments in full commencing August 2, 1883, and ending August 9.

A contract between Louis N. Bell and Henry K. McHarg was also introduced in evidence, which shows that on the 14th of July, 1893, the New York Central & Hudson River Railroad Company agreed to purchase from them, at the

price or rate of eighty cents on the dollar, second mortgage bonds of the New York & Northern Railway Company of the par value of at least \$750,000, to be paid for at that rate in the bonds of the company which should, at the time of their issue, be the owner of the railroad covered by such mortgage, and a part of an issue of \$6,200,000, bearing interest at the rate of four per cent. per annum, payable one hundred years from the date of the new bonds, and secured by a mortgage upon said mortgaged property, principal and interest to be guaranteed by the New York Central & Hudson River Railroad Company; the purchase money to bear interest at four per cent. from July 13, 1893, to be paid either by making the new bonds draw interest from that date, or by delivering to them bonds of the \$5,000,000 issue, the par value of which should be equal to the interest from July 13; the New York Central & Hudson River Railroad Company to have the option to pay the purchase price in cash. The contract also provided that the bonds purchased might be used by Messrs. Drexel, Morgan & Company for the purpose of reorganizing the New York & Northern Railway Company.

The president of the New York Central & Hudson River Railroad Company gave the following testimony: "I was aware of the notice sent by Drexel, Morgan & Company to the Farmers' Loan & Trust Company, and I acquiesced in having it sent. It was sent in pursuance of the general purpose expressed in our circular of March 18, 1893, and our statement of June 30, 1893, to our stockholders, to acquire control, by lease or otherwise, of the New York & Northern Railroad property." The evidence also disclosed that in October, 1893, the minority stockholders gave notice to the New York Central & Hudson River Railroad Company, Drexel, Morgan & Co. and Charles T. Barney, that they were willing to contribute their proportion of the money necessary to pay or purchase the interest coupons,

for the non-payment of which such foreclosure was being had, and asked them to contribute their proportion for a like purpose. To this the New York Central & Hudson River Railroad Company made no reply. Barney replied that the stock standing in his name was owned by some one else, while Drexel, Morgan & Co. declined to act upon that proposition. That the New York & Northern Railway Company and the New York Central & Hudson River Railroad Company were duly organized, and that the plaintiff was a domestic corporation, were found as facts by the court. It also in substance found that the New York Central & Hudson River Railroad Company owns and operates railroads which are parallel or competing lines with the New York & Northern Railway; that the appellant, Pick, owned one hundred shares of the capital stock of the New York & Northern Railway Company, and represented about eighteen thousand other shares of such capital stock, and the defendant, Holmes, owned one thousand two hundred shares; and that the purchase of the bonds by the New Central & Hudson River Railroad Company was after default had been made in the payment of interest thereon. The court also found that the plaintiff had received a written request, signed by the holders of more than \$2,000,000 in amount of such bonds, requesting it to bring an action for the foreclosure and sale of the premises covered by such mortgage; that it was for the best interests of all concerned that all the property should be sold in one parcel, and a sale in any other way would be greatly to the detriment and injury of the parties interested in the railroad and its affairs; and that the rights of all the parties interested could be fully protected only by a sale of the mortgaged premises, property and appurtenances as an entirety. As conclusions of law, the court held that there was due under said mortgage, for principal and interest, the sum of \$3,453,511.11, and that the plaintiff was entitled to a judgment of foreclosure and sale.

James C. Carter and *Simon Sterne*, for appellants.—The defence pleaded in the answer was a valid one, and, if proved, should have defeated the foreclosure of the mortgage on the Northern Company's railway. The Central Company had no right to purchase the stock of the Northern Company with a hostile intent towards that corporation: *Perry on Trusts*, §§ 166, 428–435; *Draper v. Gordon*, 4 Sandf. Ch. (N. Y.) 210; *Slade v. Van Vechten*, 11 Paige, Ch. (N. Y.) 21; *Quackenbush v. Leonard*, 9 Paige, Ch. (N. Y.) 334; *Lewin on Trusts*, (8th ed.), 275–280; *Jackson v. Ludeling*, 21 Wall. 616; *Wright v. O. G., etc., M. Co.*, 40 Cal. 20; *Ervin v. O. R. & N. Co.*, 27 Fed. Rep. 625; *Taylor v. C. & M. R. Co.*, 2 L. R. Exch. 356; *Meeker v. W. I. Co.*, 17 Fed. Rep. 48; *Cook on Stockholders*, § 622; *Morawetz on Corp.* § 529; *Beach on Private Corp.* § 70; 2 *Bigelow on Frauds*, 645; *Pearson v. C. R. R. Co.*, 13 Am. & Eng. R. Cases, 94, 102; *Van Horne v. Fonda*, 5 Johns. Ch. (N. Y.) 388; *Swinburne v. Swinburne*, 28 N. Y. 568. It was error for the trial court to decline to consider undisputed testimony and to refuse to make the findings of fact requested by appellants, although such court admitted in many instances, by the very form of its refusal to find “as being immaterial and a mere recitation of testimony,” that the facts requested by appellants to be found had really been established. These erroneous refusals to find, and the additional error in actually making findings unsupported by any evidence whatever, furnish all-sufficient and numerous grounds for the reversal of the judgment appealed from: *Callanan v. Gilman*, 107 N. Y. 360; *Baldwin v. Doying*, 114 N. Y. 452. The trial court erred in excluding evidence submitted by appellants in proof of the allegations of their defence, its errors in this respect being largely due to its erroneous views as to the validity of such defence, which caused it to regard evidence in support thereof as immaterial and irrelevant. The numerous exceptions to such rulings of the court are well taken: *Baylies on Code*

Pleading, 784; Hubbard v. Gorham, 38 Hun, (N. Y.) 162; Walter v. Fowler, 85 N. Y. 621; 2 Perry on Trusts, § 760; 1 Rice on Ev. 511, 512, 615; McGrath v. Bell, 42 How. Pr. (N. Y.) 182; Van Buren v. Wells, 19 Wend. (N. Y.) 203. The plaintiff had no authority or right to bring this foreclosure suit, it not having received a valid request so to do from a sufficient number of bondholders as contemplated by the mortgage. It was error for the court to refuse so to find. And it was likewise error to refuse to dismiss the complaint on this ground at the close of the plaintiff's case: C. & V. R. R. Co. v. Fosdick, 106 U. S. 47.

Ashbel Greene, David McClure and Thomas Thacher, for respondents.—The respondents claim that the answer is only on behalf of the company, and is to be considered precisely as if served by the corporation; that the intervenors, as individual stockholders, could not have defended, and that it follows that the defendants are bound by the corporate acts and admissions of the railway company, and proofs conclusive against the company are conclusive against Pick and Holmes in the present suit: Hyatt v. Allen, 56 N. Y. 553; Burrall v. B. R. R. Co., 75 N. Y. 216; Jermain v. L. S. & M. S. R. Co., 91 N. Y. 492; Davenport v. Dows, 18 Wall. 626; Humphreys v. McKissock, 140 U. S. 304; Porter v. Sabin, 149 U. S. 473; P. C. Co. v. M. P. R. Co., 115 U. S. 587; Morgan v. R. R. Co., 1 Woods, (U. S.) 15; Sala v. City of N. O., 2 Woods, (U. S.) 188; Forbes v. M. & P. R. R. Co., 2 Woods, (U. S.) 323; Porter v. P. B. S. Co., 120 U. S. 670; McMullen v. Ritchie, 64 Fed. Rep. 253. The plaintiff's case entitled it to judgment: Laws of 1892, chap. 688, § 5; Muller v. Dows, 94 U. S. 444; Hammock v. L. & T. Co., 105 U. S. 77; Columbia Co. v. K. R. Co., 60 Fed. Rep. 794; M. & W. R. R. Co. v. Parker, 9 Ga. 377. No request to foreclose is required by the mortgage: Hollister v. Stewart, 111 N. Y. 644; Shaw v. R. R. Co., 100 U. S. 605; M. R. R. & S. Co. v. T. C. R. Co., 137 U. S. 171; G. T. & S. D. Co. v. G. C. S. & M.

R. R. Co., 139 U. S. 137. The trustee was requested to foreclose by the holders of \$2,000,000 of bonds: *Bowling v. Harrison*, 6 How. (U. S.) 248; *Smedes v. Bank of Utica*, 20 Johns. (N. Y.) 372. The appellants cannot make out a defence by combining facts proved with facts which they claim to have been erroneously prevented from proving: Code Civ. Proc. § 522. Upon the facts proved, no defence was made out based upon the appellants' theory of a trust with respect to the use of the bonds, because the bonds and a majority of the stock were held together: *B. C. & I. Co. v. Humes*, 157 Pa. 278; *Mickles v. R. C. Bank*, 11 Paige, Ch. (N. Y.) 118; *Pratt v. Bacon*, 10 Pick. (Mass.) 123; *Russell v. M'Lellan*, 14 Pick. (Mass.) 63; *Abbott v. Merriam*, 8 Cush. (Mass.) 588; *Gillett v. Bowen*, 23 Fed. Rep. 625; *Gamble v. Q. C. W. Co.*, 123 N. Y. 91; *Harpending v. Munson*, 91 N. Y. 650; *Leavenworth Co. Comrs. v. C. R. I. & P. R. Co.*, 134 U. S. 688; *C. T. Co. v. Bridges*, 57 Fed. Rep. 753; *F. C. Co. v. Fitzgerald*, 137 U. S. 98. Upon the facts proved, no defence was made out upon the theory that the purpose with which the Central bought bonds prevented their enforcement of the mortgage: *Morris v. Tuthill*, 72 N. Y. 575; *Phelps v. Nowlen*, 72 N. Y. 39; *C. B. Co. v. Paige*, 83 N. Y. 178; *Ramsey v. E. R. Co.*, 8 Abb. Pr. N. S. (N. Y.) 174; *Ervin v. O. R. & N. Co.*, 20 Fed. Rep. 577; *Clinton v. Myers*, 46 N. Y. 511; *Oglesby v. Attrill*, 105 U. S. 605; *Simpson v. Dall*, 3 Wall. 460; *Adler v. Fenton*, 24 How. (U. S.) 407. Upon the facts proved, which are referred to under the last two points, no defence was made out upon any combination of the grounds therein referred to: *Beveridge v. N. Y. E. R. R. Co.*, 112 N. Y. 1. Upon the facts proved, no defence was made out upon any theory of combination or conspiracy: *Ambler v. Choteau*, 107 U. S. 586; *Kent v. L. S. C. Co.*, 144 U. S. 75. No defence was made out as based upon a diversion of earnings causing default: *Day v. O. & L. C. R. R. Co.*, 107 N. Y. 129; *Thomas v. N. Y. & G. L. R. Co.*, 139 N. Y. 163; *Parsons v. Hayes*, 18 J. & S.

(N. Y.) 29; Mann v. Currie, 2 Barb. (N. Y.) 294; *In re* S. C. & N. Y. R. R. Co., 91 N. Y. 1; Dimpfell v. O. & M. R. Co., 110 U. S. 209; Beveridge v. N. Y. E. R. R. Co., 112 N. Y. 1; Leslie v. Lorillard, 110 N. Y. 519; P. C. Co. v. M. P. Co., 115 U. S. 587; Porter v. P. B. S. Co., 120 U. S. 649; Allen v. Wilson, 28 Fed. Rep. 678. The question whether the Central had power to buy the bonds and stock of the Northern is wholly irrelevant. But it clearly had the power: Laws of 1887, chap. 616, §§ 4, 15, 18, 19, 46, 48; H. & G. M. Co. v. H. & W. M. Co., 127 N. Y. 252; S. L. Co. v. North, 4 Johns. Ch. (N. Y.) 370; S. N. Co. v. Weed, 17 Barb. (N. Y.) 378; Humbert v. Trinity Church, 24 Wend. (N. Y.) 587; Bogardus v. Trinity Church, 4 Sandf. Ch. (N. Y.) 633. There is nothing in the point made that failure to demur or object to the answer permitted the introduction of immaterial evidence: Code Civ. Proc. § 499; Corning v. Corning, 6 N. Y. 97; Braman v. Bingham, 26 N. Y. 483, 490; Bronner v. Frauenthal, 37 N. Y. 166. There was no error committed in the exclusion of evidence offered in support of the defence: Howard v. C. F. Ins. Co., 4 Den. (N. Y.) 502. The appellants do not particularize the precise exceptions to refusals to find upon which they rely, but make a summing up of what they state are the facts proven beyond dispute, and seek to throw upon respondents' counsel and the court the task of seeing whether perchance some fact or other which would possibly have been found has escaped the notice of the trial judge or of opposing counsel. This course of procedure has received no countenance from this court: Quincey v. Young, 53 N. Y. 507; Callanan v. Gilman, 107 N. Y. 360; Stewart v. Morss, 79 N. Y. 629; Baldwin v. Doying, 114 N. Y. 452; Glacius v. Black, 50 N. Y. 145; Quincey v. White, 63 N. Y. 370, 381.

MARTIN, J. (after stating the facts.)—That the New York Central & Hudson River Railroad Company purchased a majority of the second mortgage bonds and a majority of

the stock of the New York & Northern Railway Company, for the sole purpose of obtaining control of the property of the latter, is clearly established by the proof contained in the record. Indeed, such was the avowed purpose of its purchase. The record renders it equally clear that the New York Central & Hudson River Railroad Company was the actual and beneficial owner of such bonds and stock for several months before the commencement of this action. They were retained in the hands of Drexel, Morgan & Co., not as owners or holders in their own right, but as agents or naked trustees for the New York Central & Hudson River Railroad Company, and were clearly subject to the order and control of the latter. Moreover, the request that Drexel, Morgan & Co. made to the plaintiff to commence this action was not only based upon the bonds owned by the New York Central & Hudson River Railroad Company and others it had contracted to purchase, but the sole purpose of that request was to procure a foreclosure, and thus enable the New York Central & Hudson River Railroad Company to acquire control of the property and franchises of the New York & Northern Railway Company for its own benefit, as set forth in the circular letter sent to the stockholders of the New York Central & Hudson River Railroad Company. The president of the latter company himself testified that that was the object and purpose which induced the sending of the notice requesting the commencement of this action. The notice given by the New York Central & Hudson River Railroad Company to its stockholders states the fact that on March 18, 1893, agreements had already been made in respect to the purchase of a controlling interest in the New York & Northern Railway Company, subject to the approval therein asked for. The letter of Drexel, Morgan & Co. to the treasurer of the New York Central & Hudson River Railroad Company, dated April 5, 1893, shows that the majority of the stock and bonds mentioned therein was held by them, subject to the order of the New York Central

& Hudson River Railroad Company, and that they had received the note of that company in payment therefor. Thus, it is obvious that this action was procured to be commenced by the New York Central & Hudson River Railroad Company, while it owned a majority of the stock and bonds of the New York & Northern Railway Company, for the sole and avowed purpose of obtaining control of its property and business, regardless of the rights of the minority stockholders or the owners of the remainder of the bonds. The appellants contend that the New York Central & Hudson River Railroad Company, as such majority stockholder, also acquired the entire control of the affairs of the New York & Northern Railway Company through its board of directors, who were willing to serve the interests of those owning a majority of the stock, as was indicated by the resignation of three of the directors, the appointment of others in their places, by the resignation of two officers who occupied important positions in the affairs of that company, and by the appointment of two officers in their places who were in the employ of the New York Central & Hudson River Railroad Company to discharge the duties of such officers, and compensated for their services by the New York Central & Hudson River Railroad Company. While the proof upon that question was not perhaps conclusive, yet the circumstances developed by the evidence plainly indicate that, after it became the owner of a majority of the stocks and bonds, the New York Central & Hudson River Railroad Company dictated and governed the action of the board of directors and controlled the management of the affairs of the New York & Northern Railway Company.

The facts already referred to are strong proof that the New York Central & Hudson River Railroad Company was in the control of the affairs of the New York & Northern Railway Company. It is hardly to be supposed that a board of directors which was not under the control of another corporation would appoint three of the friends of

the president of that corporation as directors of the company, and place the officers of that company in control of its financial affairs, especially when it was the owner of competing lines of railroad. The clear and legitimate inference to be drawn from the circumstances proved in this case is that, after the New York Central & Hudson River Railroad Company purchased a majority of the stock and bonds of the New York & Northern Railway Company, it controlled its officers and directors as fully and completely as though they had been elected by its votes. All the facts and circumstances, so far as the defendants were permitted to prove them, tend to show that such was the situation. Indeed, it is a matter of common knowledge that, where the ownership of a majority of the stock of such a corporation changes, the board usually changes, unless its members are already in harmony with the policy of the purchasers.

On the trial the appellants sought to prove that after the New York Central & Hudson River Railroad Company became the owner of such stock and bonds, and while its officers were in substantial control of the New York & Northern Railway Company, they declined to accept traffic from other roads that would have produced a fund with which to pay the interest due on the bonds in question ; that the income of the road which should have been employed to pay such interest was used for other and improper purposes ; and that such action caused the inability of the New York & Northern Railway Company to pay the interest, and thus cure its default. This evidence was rejected as immaterial, and the appellants duly excepted.

In determining the correctness of the rulings made by the trial court, it becomes necessary to determine incidentally whether a corporation, purchasing a majority of the stock of another competing corporation, may thus obtain control of its affairs, cause it to divert the income from its business, or to refuse business which would enable it to pay the interest for which it was in default, and then insti-

tute an action in equity to enforce its obligations for the purpose of obtaining control of its property at less than its value, to the injury of the minority stockholders, and they have no remedy; or, in other words, whether a court of equity, with those facts established, would lend its aid to such a stockholder by enforcing the mortgage and decreeing a foreclosure and sale of the mortgaged premises, at its request, in its behalf, and to accomplish such a purpose. If it would, then the rulings of the trial court were proper; if not, then the appellants were entitled to prove those facts, and it was error to reject the evidence.

In *Gamble v. Q. C. Water Co.*, 123 N. Y. 91, 25 N. E. Rep. 201, in discussing a similar question, Judge PECKHAM, in effect, said that, although it is not every question of mere administration or of policy upon which there might be a difference of opinion that would justify the minority in coming into a court of equity to obtain relief, yet, where the action of a majority of the stockholders of a corporation is fraudulent or oppressive to the minority shareholders, an action may be maintained by the latter, where the contemplated action of the majority is so far opposed to the interests of the corporation as to lead to a clear inference that such action is with an intent to serve some outside purpose, regardless of the consequences to the company and inconsistent with its interests.

In *Pondir v. N. Y., L. E. & W. Railroad Co.*, 72 Hun, (N. Y.) 384, 389, 25 N. Y. Suppl. 560, where the Erie Railroad Company, through the action of the Buffalo, Bradford & Pittsburgh Railroad Company, whose directors were elected and controlled by the Erie Company, without consideration, obtained the property of the latter corporation, and so arranged its affairs as to render all the shares of its stock, other than those held by the Erie Company, valueless, it was held that a stockholder of the Buffalo, Bradford & Pittsburgh Railroad Company might maintain an action to redress the wrong done to his company. In that case

Mr. Justice FOLLETT said: "This was a fraud on the Buffalo, Bradford & Pittsburgh Railroad Company and its shareholders. Such frauds are not uncommon in the management of corporations, and, when they are exposed, should be condemned by the courts, and a heavy hand laid upon all who participate in them."

In *Barr v. N. Y., L. E. & W. Railroad Co.*, 96 N. Y. 444, where the officers of another corporation had leased the property of the first corporation, controlled a majority of its stock, and conspired to compel the minority to sell its stock by refusing to pay the rent due, it was held that a court of equity, on the application of the minority, would compel the payment of the rent; and that where the majority of the stockholders of a corporation are illegally pursuing a course which is in violation of the rights of the other stockholders, an action to obtain equitable relief may be maintained by an aggrieved stockholder.

Sage v. Culver, 147 N. Y. 241, 41 N. E. Rep. 513, is to the effect that, when it can be fairly gathered that the officers and directors of a corporation have made use of relations of trust and confidence to secure or promote some selfish interest, it is enough to set a court of equity in motion, and to require them to explain such a transaction which there is a presumption against in equity.

In *Meyer v. Staten Island Railway Co.*, 7 N. Y. St. Rep. 245, it was held that a majority of the stockholders of a corporation would not be permitted to sanction a transaction which is the outcome of a scheme, dishonest or fraudulent in its inception, and that the minority stockholders have rights which, under such circumstances, must be recognized; that the majority may legally control the company's business, but in assuming such control they take upon themselves the correlative duty of diligence and good faith; and that they cannot manipulate the company's business in their own interests, to the injury of the minority stockholders.

In *Ervin v. Oregon Ry. & Navigation Co.*, 27 Fed. Rep.

625, it was held that when a number of stockholders combine to constitute themselves a majority to control the corporation as they see fit, they become, for all practical purposes, the corporation itself, and assume the trust relation of the corporation towards its stockholders; and if they seek to make profit out of it at the expense of those whose rights are the same as their own they are unfaithful to the relation they have assumed, and guilty, at least, of constructive fraud, which a court of equity will remedy.

In *Wright v. Oroville Mining Co.*, 40 Cal. 20, it was, in substance, held that in dealing with the relations between a corporation and its officers, on one hand, and the stockholders, upon the other, in the management of the corporate affairs, courts of equity will look beyond the mere observance of the forms of law, and inquire if the authority has been in good faith exercised to promote the interests of the stockholders; and that a court of equity will, at the instance of a stockholder, control the corporation and its officers, and restrain them from doing acts even within the scope of the corporate authority, if such acts would amount to a breach of the trust upon which the authority had been conferred.

In *Meeker v. Winthrop Iron Co.*, 17 Fed. Rep. 48, it was held that a majority of the holders of the capital stock of a corporation could not, by their votes in a stockholders' meeting, lawfully authorize its officers to lease its property to themselves, or to another corporation formed for the purpose, and exclusively owned by them, unless such lease was made in good faith and supported by an adequate consideration; and that in a suit, properly prosecuted, to set aside such a contract, the burden of proof, showing fairness and adequacy, is upon the party or parties claiming thereunder.

In *Goodin v. Cincinnati & Whitewater Canal Co.*, 18 Ohio St. 169, a railroad company purchased a majority of the shares of stock in a canal company, elected for the latter a board of directors who were in the interest of the railroad

company, and then, with the assent of such board, appropriated the entire canal and property of the canal company as a railroad track, paying therefor a price or compensation which was agreed upon by the directors of the two companies, but which was far below the actual value of the property. Under those circumstances the court held that, although the stockholders and creditors of the canal company could not, after the road had been completed, reclaim the property or enjoin its use, yet they were not concluded by such agreement as to the price of the property, but might compel the railroad company to account for its additional value.

In *Jackson v. Ludeling*, 21 Wall. 616, it was held that the managers and officers of a company where capital is contributed in shares are in a very legitimate sense trustees, alike for its stockholders and its creditors, though they may not be trustees technically and in form. They, accordingly, have no right to enter into or participate in any combination the object of which is to divest the company of its property and obtain it for themselves at a sacrifice. They have no right to seek their own profit at the expense of the company, its stockholders or even its bondholders. In case of embarrassment to the company, and any necessity to sell the estates of the company, it is their duty, to the extent of their power, to secure for all those whose interests are in their charge the highest possible price for the property which can be obtained.

In *Menier v. Hooper's Telegraph Works*, 9 L. R. Ch. App. 350, it was held that where a majority of a company proposed to benefit themselves at the expense of the minority the court might interfere to protect the minority, and that in such a case the bill is rightly filed by one shareholder on behalf of the others and against the company.

In *Gregory v. Patchett*, 33 Beav. 595, where the only available property of a company was transferred to two shareholders in lieu of their shares, and the company was thereby

practically put to an end, and this was sanctioned by a majority of the shareholders at a general meeting, it was held that the majority could not bind the minority in such a transaction; that where measures were adopted which were plainly beyond the powers of the company, and inconsistent with the objects for which the company was constituted, the court, at the instance of the minority, would interpose to prevent the performance of such an act.

While the opinions in the cases cited are instructive, and have an important bearing upon the question under consideration, still, within the limits of this opinion, we have found it impracticable to quote from the language of the courts in those cases. "The law requires of the majority of the stockholders the utmost good faith in their control and management of the corporation as regards the minority, and in this respect the majority stand in much the same attitude towards the minority that the directors sustain towards all the stockholders. Thus, where the majority are interested in another corporation, and the two corporations have contracts between them, it is fraudulent for that majority to manage the affairs of the first corporation for the benefit of the second. A court of equity will intervene and protect the minority upon an application by the latter:" 2 Cook, Stock, Stockh. & Corp. Law, (3d ed.) § 662, p. 945. The same principle is stated in 1 Mor. Priv. Corp. (2d ed.) § 529; 1 Beach, Priv. Corp. § 70; 2 Bigelow, Frauds, § 645, and Beach, Mod. Eq. Jur. §§ 132, 686.

Hackettstown Nat. Bank v. D. G. Yuengling Brewing Co., 15 N. Y. Law Jour. 541, 20 C. C. A. 327, 74 Fed. Rep. 110, is to the effect that every delegation of power implies that it will be honestly exercised, and in that case it was held that the evidence offered upon the trial presented a question of fact for the jury whether a consent, given in pursuance of a resolution passed by a majority of the bondholders of a corporation, extending the time of payment of the principal and interest of its bonds, was

given in good faith, in the common interest of all, or amounted to an unwarranted exercise of the power of the majority, because given in the interest of one bondholder, with a view of enabling him to compel the minority bondholders to sell their bonds on such terms as he might dictate.

While the question, in some of the cases cited arose between stockholders and the directors and officers of a company who, as such, held a position of trust as to the former, still where, as in this case, a majority of the stock is owned by a corporation or a combination of individuals, and it assumes the control of another company's business and affairs through its control of the officers and directors of the corporation, it would seem that, for all practical purposes, it becomes the corporation of which it holds a majority of stock, and assumes the same trust relation towards the minority stockholders that a corporation itself usually bears to its stockholders, and therefore, under such circumstances, the rule stated in the Sage case and other similar cases applies to majority stockholders who control the affairs of the company, as well as to its directors or officers.

It is a controlling maxim that a court of equity will not aid parties in the perpetration or consummation of a fraud, nor give any assistance whereby either of the parties connected with the betrayal of a trust can derive any advantage therefrom: *Farley v. Railway Co.*, 4 McCrary, (U. S.) 138, 14 Fed. Rep. 114. "It is a sound principle that he who prevents a thing being done shall not avail himself of the non-performance he has occasioned:" *Fleming v. Gilbert*, 3 Johns. (N. Y.) 528, 531; *U. S. v. Peck*, 102 U. S. 64; *Dolan v. Rodgers*, 149 N. Y. 489, 44 N. E. Rep. 167.

The principle of these authorities renders it quite obvious that a corporation, purchasing a majority of the stock of another competing one, cannot obtain control of its affairs, divert the income of its business, refuse business which would enable the defaulting company to pay its interest,

and then institute an action in equity to enforce its obligations, for the avowed purpose of obtaining entire control of its property, to the injury of the minority stockholders. Such a course of action is clearly opposed to the true interests of the corporation itself, and plainly discloses that one thus acting was not influenced by any honest desire to secure such interests, but that its action was to serve an outside purpose, regardless of consequences to the debtor company, and in a manner inconsistent with its interest and the interest of its minority stockholders.

The respondents, however, contend that the doctrine of the authorities cited is not controlling in this case, but that the New York Central & Hudson River Railroad Company had a right to purchase a majority of the stock and bonds of the New York & Northern Railway Company, for the express purpose of obtaining control of the affairs of the latter for its own use and benefit, and to thus acquire its property at less than its actual value, to the injury of the minority stockholders; and that such stockholders had no remedy, in law or in equity, to protect themselves against such action of the majority stockholders, although it diverted the income which should have been applied to the payment of such interest to other and improper purposes, and refused business which would have enabled the defaulting company to pay its interest. In other words, the claim of the respondents is, and the general term in effect held, that the purpose for which the New York Central & Hudson River Railroad Company obtained a majority of the stock and bonds of the New York & Northern Railway Company is entirely immaterial, and that, notwithstanding the existence of such a purpose, a court of equity will aid them in enforcing the mortgage. To sustain this contention they cite *Morris v. Tuthill*, 72 N. Y. 575; *Phelps v. Nowlen*, *Id.* 39; *Bridge Co. v. Paige*, 83 N. Y. 178; *Ramsey v. Railway Co.*, 8 Abb. Pr. N. S. (N. Y.) 174; *Clinton v. Myers*, 46 N. Y. 511; *Simpson v. Dall*, 3 Wall. 460; *Oglesby v. Attrill*, 105 U. S.

605; *Adler v. Fenton*, 24 How. 407; and *Beveridge v. Railroad Co.*, 112 N. Y. 1, 19 N. E. Rep. 489.

In *Morris v. Tuthill* the action was to foreclose a mortgage brought by an assignee. There was no question or principle of trust involved in that case. The plaintiff owed the defendant no duty, and hence it was held that under such circumstances the plaintiff had a right to maintain an action for the foreclosure of the mortgage, although he took title to it from motives of malice, and the assignor assigned the mortgage to him from a like motive. That that case was correctly decided we have no doubt, but it is clearly distinguishable in principle from the case at bar, and has no bearing whatever upon the question under consideration.

In the *Phelps* case it was held that a party was not liable for the consequences of an act done upon his own land, lawful in itself, which did not infringe upon any lawful right of another, simply because he was influenced in doing it by wrong and malicious motives, and that courts would not inquire into the motives actuating a person in the enforcement of a legal right. How the doctrine of that case is applicable to the question involved in this it is difficult to perceive. In that case the party simply exercised a lawful right, and the court held that no liability arose from his having done so. There the plaintiff owed the defendant no duty, and sustained no relation of trust towards him, and hence it is clearly distinguishable from the case at bar. The same may be said of *Bridge Co. v. Paige*, *Ramsey v. Railway Co.*, *Clinton v. Myers*, *Simpson v. Dall*, *Oglesby v. Attrill*, and *Adler v. Fenton*. We do not think these cases in any way aid the respondents.

. In the *Beveridge* case this court held that all the powers conferred upon a corporation, unless otherwise expressly prescribed, must be exercised by its directors, who are constituted by law the agency for that purpose; that the consent or ratification by its stockholders was unnecessary, unless required by statute or its by-laws, and, therefore, that contracts which

a corporation may legitimately make may be made by its board of directors, and, in the absence of fraud or collusion on the part of the directors, they are binding upon the corporation; that an appeal to equity on the part of the stockholders to be relieved from the acts of the directors, where they were within their powers, and apparently uninfluenced by corrupt motives or personal interests adverse to those of the stockholders, should, at least, be justified by some showing that the acts were improper, within the belief of a fair proportion of the stockholders. The principle enunciated and the decision made in that case are undoubtedly correct; but the question as to the right of a majority of the stockholders of a corporation to enforce its obligations as against the minority stockholders to their injury, by reason of a default caused by the wrongful act or omission of the majority, was not considered or in any way involved. It, however, seems to recognize the principle that, where there is fraud or collusion, corrupt motives, or personal interest adverse to the stockholders, another rule would apply. As we have already seen, there are circumstances under which the majority stockholders occupy substantially the same relations of trust towards the minority as the board of directors would occupy towards the stockholders it represents, and hence, where there are corrupt motives, personal interest or fraud, the case cited is an authority to sustain the conclusion which we have already reached.

That any person or corporation authorized to do so might have purchased the bonds of the New York & Northern Railway Company, and have rigorously enforced them by a sale of its property, there can be no doubt. They might also have purchased the stock of the company, and thus have become the owners of both, and, while such owners, might have enforced the liability of the company upon its bonds, so long as they acted in good faith and their purpose was proper. But when the New York Central & Hudson River Railroad Company purchased the stock and

bonds in question, thus obtaining a controlling interest in the affairs of the New York & Northern Railway Company, for the avowed purpose of destroying it, to serve a purpose entirely outside of that for which it was organized, and in hostility to it, it becomes clear that, as such stockholder, it owed a duty to the minority stockholders; that the law implied a *quasi* trust upon its part; and that a court of equity will not aid it in the destruction of that corporation, and a confiscation of its property, although it held a majority of its stock and the required amount of its bonds.

Hence we are of the opinion that the court erred in rejecting, as immaterial, evidence offered by the appellants to show that after the New York Central & Hudson River Railroad Company became the owner of a majority of the stock and bonds of the New York & Northern Railway Company, and while its officers were in control of the latter corporation and its affairs, it declined to accept traffic from other roads, which would have produced a fund with which to pay the interest that was due; that the income of the road, which should have been employed to pay such interest, was used for other and improper purposes; and that such action upon the part of the majority stockholder occasioned the inability of the company to pay the interest and cure the default. To the rejection of this evidence the defendants excepted. We think many of these rulings were erroneous, and that the appellants had the right to make the proof offered, so far as it related to the transaction of the business of the New York & Northern Railway Company during the time the New York Central & Hudson River Railroad Company owned a majority of its stock, and controlled its affairs; and for the error in those rulings the judgment should be reversed.

On the trial, the learned trial judge refused to find various facts, upon the ground that they were immaterial. It is manifest from an examination of the appellants' requests to find, and the rulings of the court thereon, that it refused

to find many facts that were material to sustain the appellants' defence, and which were established by the undisputed evidence in the case. This, we think, constituted error, as it is the duty of a trial judge to find upon every material question submitted to him and involved in the evidence: *Callanan v. Gilman*, 107 N. Y. 360, 372, 14 N. E. Rep. 264.

The respondents claim that by virtue of the provisions of § 40 of the stock corporation law, the New York Central & Hudson River Railroad Company had the right to acquire the stock of the New York & Northern Railway Company. We do not deem it necessary to either discuss or decide that question, for, if it be admitted that the New York Central & Hudson River Railroad Company was authorized to purchase such stock and bonds, still nothing will be found in the statute which authorizes it to employ them for the purpose of destroying the property of the New York & Northern Railway Company, to the injury of its minority stockholders. If we are correct in our conclusion that a corporation cannot acquire the majority of the stock of another corporation, obtain control of its affairs, divert the income of its business, refuse business which would have enabled the defaulting company to pay its interest, and then institute an action in equity to enforce its obligations against such company, with the avowed purpose of obtaining control of its property at less than its value to the injury of the minority stockholders, then it follows that this question is entirely immaterial. If the New York Central & Hudson River Railroad Company had a right to purchase the stock and bonds of the New York & Northern Railway Company, it obtained no better title and secured no greater right than any other stockholder would have acquired under a similar purchase. The right to purchase, even if given by statute, conferred upon the purchaser no authority to employ the stock and bonds for purposes condemned by the principles of equity.

The appellants also contend that the plaintiff had no authority or right to bring this action in the form in which it was brought, as it had not received a valid request to do so from a sufficient number of bondholders. The mortgage provides: "In the event of any of the defaults mentioned in the next preceding article, the party of the second part may, and, upon the written request of the holders of \$2,000,000 in amount of said bonds then outstanding and unpaid or unredeemed, the party of the second part shall apply to any court having proper jurisdiction in the premises for a foreclosure and sale of the mortgaged premises." The plaintiff, in its complaint, alleged that it had received a written request, signed by the holders of more than \$2,000,000 in amount of said bonds outstanding and unpaid or unredeemed, requesting it to bring proceedings for the foreclosure and sale of the property and premises covered by this mortgage. The only request which was made to the trustee was that made by Drexel, Morgan & Co., who stated therein that they were the holders of \$1,700,000, and represented the owners of \$896,000 of such bonds. It was upon this request alone that the action was instituted. The proof tends to show that, although bonds to the amount of \$1,700,000 were in their hands, yet that they were not in fact the owners of such bonds, but they belonged to the New York Central & Hudson River Railroad Company. The proof also tends to show that the other bonds which they claimed to represent were not owned by Drexel, Morgan & Co., but were bonds which the New York Central & Hudson River Railroad Company had made a contract to purchase. Thus, we have a request for foreclosure by a firm who in fact was not the owner of any portion of the bonds upon which the request was based. It is true that \$1,700,000 of the bonds were in their possession, but it clearly appears from the evidence they had been purchased and paid for by the New York Central & Hudson River Railroad Company, and were held by them subject to

its order. It is also true that the contract with the New York Central & Hudson River Railroad Company for the purchase of the other bonds referred to in such request contained a provision that they might be used by Drexel, Morgan & Co. for the purpose of reorganizing the New York & Northern Railway Company. Without any lengthy discussion of this question, it would seem that the purpose of this provision in the mortgage was to prevent the trustee from being compelled to foreclose the mortgage except upon the request of the owners of \$2,000,000 in amount of the bonds. If such was its purpose, and such is the proper construction of that provision of the mortgage, then, manifestly, the request was insufficient, as it was not thus made.

It is, however, contended that inasmuch as the plaintiff had the right, of its own motion or in its discretion, to commence this action without any request whatever, it follows that the action, having been commenced, was properly begun, and the appellants' contention cannot be sustained. The mortgage provides for two cases in either of which the action might be properly commenced. The trustee might act upon its own motion, and exercise its own judgment and discretion upon the question whether it was for the interest of the bondholders and all concerned to have the mortgage foreclosed; and, if it so determined, it might institute an action for its foreclosure, although no request whatever was made. On the other hand, it might be required to institute such an action upon the written request of the owners of \$2,000,000 of the bonds, notwithstanding the fact that it might be opposed to such a course, and it was contrary to its judgment. One provision is permissive only, while the other is mandatory. It does not necessarily follow, because the plaintiff might have instituted this action in the exercise of its discretion, but was induced to bring it, relying upon a request that was invalid, that it may now be upheld upon the ground that it possessed a discretion which it

never exercised. The action was brought upon the theory that the holders of \$2,000,000 of the bonds had made a proper written request upon the plaintiff to commence it. Such having been the original character of the action, as indicated by the complaint, can it now be said that, although no proper request was made, yet the action may be maintained, because the plaintiff might, in its discretion, have determined to bring the action, although there had been no request? It would seem that under the provision of the mortgage permitting the plaintiff to bring this action, to some extent at least, the question whether or not it would foreclose the mortgage, and declare the whole amount due, was one of judgment and discretion to be exercised by it before the commencement of the action. Not having voluntarily sought to thus enforce the obligations of the company, but having had served upon it a request which purported to be signed by the holders of \$2,000,000 of the bonds, and having commenced the action in pursuance of that request, we regard it as at least doubtful if it can now be maintained upon the ground that it was voluntarily commenced by the plaintiff if the request was invalid. But it is, perhaps, unnecessary to determine that question.

There are several other questions raised by the appellants, but, as the judgment must be reversed for the errors already pointed out, it is unnecessary to discuss or determine them.

This consideration of the questions involved in the case has led us to the conclusions that the learned trial judge erred (1) in refusing to find material facts upon the ground that they were immaterial; (2) in declining to find other facts which were material, and established by the uncontradicted evidence; (3) in rejecting, as immaterial, evidence offered by the appellants tending to show that the New York Central & Hudson River Railroad Company, while in control of the affairs of the New York & Northern Railway Company, declined to accept traffic from other roads, which

would have produced a fund with which to pay the interest due upon the bonds in suit; and (4) in rejecting, as immaterial, evidence to show that the income of the road, which should have been employed to pay the interest on such bonds, was used for other and improper purposes. We think the judgment should be reversed, and a new trial granted, with costs to abide the event. All concur, except ANDREWS, C. J., and GRAY, J., not voting. Judgment reversed.

HOLDING OF STOCK OF ONE CORPORATION BY ANOTHER.

1. Purchase of Stock of another Corporation Ultra Vires.—As a general rule, one corporation cannot become a stockholder in another, either by subscription or purchase, unless authorized to do so, by charter or statute, either expressly or by necessary implication. Such a purchase is *ultra vires*, and a note given therefor is void: Sumner v. Marcy, 3 Woodb. & M. (U. S.) 105; Easun v. Buckeye Brewing Co., 51 Fed. Rep. 156; Merz Capsule Co. v. United States Capsule Co., 67 Fed. Rep. 414; Lanier Lumber Co. v. Rees, 103 Ala. 622; Franklin Co. v. Lewiston Inst. for Savings, 68 Me. 43; Franklin Bk. v. Commercial Bk., 36 Ohio St. 350; Coppin v. Greenlees & Ransom Co., 38 Ohio St. 275; Ry. Co. v. Iron Co., 46 Ohio St. 44; see Holmes & Griggs Mfg. Co. v. Holmes & Wessell Metal Co., 53 Hun, (N. Y.) 52. Accordingly, an incorporated bank, whether private or national, cannot become a stockholder in another corporation, or act as broker in the purchase and sale of stock: Royal Bk. of India's Case, 4 L. R. Ch. 252; First Natl. Bk. v. Natl. Exch. Bk., 92 U. S. 122; Franklin Co. v. Lewiston Inst. for Savings, 68 Me. 43; Talmage v. Pell, 7 N. Y. 328; Tracy v. Talmage, 14 N. Y. 162; Nassau Bk. v. Jones, 95 N. Y. 115; First Natl. Bk. of Allentown v. Hoch, 89 Pa. 324; and if it does so purchase, will not be estopped to deny its liability as a stockholder: California Natl. Bk. v. Kennedy, 17 Sup. Ct. Rep. 831, reversing 101 Cal. 495; an insurance company cannot become a stockholder in a bank: Mechanics' Sav. Bk. & Bdg. Assn. v. Meriden Agency Co., 24 Conn. 159; State v. Butler, 86 Tenn. 614; or in another insurance company: *Ex parte* Liquidators British Natl. Life Assur.

Assn., 8 Ch. D. 679; *Berry v. Yates*, 24 Barb. (N. Y.) 199; *Pierson v. McCurdy*, 33 Hun, (N. Y.) 520; see *New York Exch. Co. v. DeWolf*, 3 Bosw. (N. Y.) 86, reversed, 31 N. Y. 273; or any other corporation: *Cooper Ins. Co. v. Hawkins*, 71 Fed. Rep. 372; one railroad company may not purchase the stock of another: *Maunsell v. Midland Great Western Ry. Co.*, 1 H. & M. 130; *Great Northern Ry. Co. v. Eastern Counties Ry. Co.*, 21 L. J. Ch. 837; *Great Western Ry. Co. v. Metropolitan Ry. Co.*, 32 L. J. Ch. 382; *Mackintosh v. Flint & Pere Marquette Ry. Co.*, 34 Fed. Rep. 582; *Central R. R. Co. v. Collins*, 40 Ga. 582; *Hazlehurst v. Savannah, G. & N. A. R. R. Co.*, 43 Ga. 13; *Pearson v. Concord R. R. Corp.*, 62 N. H. 537; *Central R. R. Co. v. Penna. R. R. Co.*, 31 N. J. Eq. 475; *Elkins v. Camden & Atl. R. R. Co.*, 36 N. J. Eq. 5; *Milbank v. N. Y., L. E. & W. R. R. Co.*, 64 How. Pr. (N. Y.) 20; see *Ryan v. Leavenworth, Atchison & N. W. R. R. Co.*, 21 Kans. 365; a dry-dock company cannot subscribe to the stock of a steamship company: *New Orleans, Florida & Havana Steamship Co. v. Ocean Dry Dock Co.*, 28 La. An. 173; a lumber company cannot subscribe to the stock of a telegraph company: *Peshtigo Co. v. Great Western Tel. Co.*, 50 Ill. App. 624; a corporation to deal in furniture cannot subscribe to the stock of a hotel company: *Knowles v. Sandercock*, 107 Cal. 629; and a corporation organized to lay out a town, etc., cannot buy the stock of a manufacturing corporation: *Pauly v. Coronado Beach Co.*, 56 Fed. Rep. 428. This rule applies with especial force to speculation or mere dealing in stocks: *Royal Bank of India's Case*, 4 L. R. Ch. 252; *First Natl. Bk. of Charlotte v. Natl. Exch. Bk. of Baltimore*, 92 U. S. 122; *Talmage v. Pell*, 7 N. Y. 328. But in the absence of proof, it will not be presumed that a purchase of stock was *ultra vires*: *In re Application of Rochester, Hornellsville & Lackawanna R. R. Co.*, 110 N. Y. 119, affirming 45 Hun, 126. If the purchase be out-and-out *ultra vires*, as in case of an investment by a national bank in the stock of another corporation, the holder will not be estopped to deny its liability as a stockholder: *California Natl. Bk. v. Kennedy*, 17 Sup. Ct. Rep. 831, reversing 101 Cal. 495. But if the purchase be simply a perversion of a lawful power existing for other purposes, the holder will be estopped: *Citizens' State Bk. of Noblesville v.*

Hawkins, 71 Fed. Rep. 369; Cooper Ins. Co. *v.* Hawkins, 71 Fed. Rep. 372. Moreover, if third parties have acquired rights on the faith of the purchase, it will not be set aside: Marbury *v.* Ky. Union Land Co., 62 Fed. Rep. 335.

2. Prohibition of holding Stock in another Corporation.—In some states a corporation is expressly forbidden by statute to hold stock in another: see Const. Ga., art. 4, § 2, par. 4; County Court *v.* B. & O. R. R. Co., 35 Fed. Rep. 161. These provisions annul a charter authority to purchase and hold such stock: Clarke *v.* Cent. R. R. & Bkg. Co. of Ga., 50 Fed. Rep. 338; but see Clarke *v.* Richmond & W. P. Terminal Ry. & Warehouse Co., 62 Fed. Rep. 328; and any attempt to evade them will be prevented. Thus, in Langdon *v.* Branch, 37 Fed. Rep. 449, an insolvent construction company had contracted to build a railroad for a corporation, and had received nearly all of the stocks, bonds and assets of the latter as security for its outlay. Without beginning the work, the persons in control of the construction company transferred all the stock to the persons who managed another railway already in existence, among whom were the president and many of its directors. The funds of the latter corporation were used in purchasing the stock of the construction company, and in this way the stock and assets of the projected road were controlled by the same management as the road then in operation. The latter began at the same point, and ran for nearly the same distance, and in the same general direction, as the projected line, which, when completed, would be a competing line. It was held that the evident purpose of this agreement was to violate the provisions of the constitution of Georgia, (art. 4, § 2, par. 4,) which renders the purchase of stock in one corporation by another, and any contract between them tending to lessen competition, illegal and void, and that the carrying out of the agreement would be enjoined. See, however, Clarke *v.* Richmond & W. P. Terminal Ry. & Warehouse Co., 62 Fed. Rep. 328, overruling Clarke *v.* Cent. R. R. & Bkg. Co. of Ga., 50 Fed. Rep. 338.

3. Authority to hold Stock in another Corporation.—The authority to hold stock in another corporation may be, and often

is, conferred expressly by the charter: *Calumet Paper Co. v. Stotts Inv. Co.*, (Iowa,) 64 N. W. Rep. 782; by general statute: *Zabriskie v. C., C. & C. R. R. Co.*, 23 How. 381; *Atchison, T. & S. F. R. R. Co. v. Fletcher*, 35 Kans. 236; *Atchison, T. & S. F. R. R. Co. v. Cochran*, 43 Kans. 225; *Davis v. U. S. Electric Power & Light Co.*, 77 Md. 35; *Oelbermann v. N. Y. & N. R. R. Co.*, 7 Misc. Rep. (N. Y.) 352; or by special act: *Mayor v. B. & O. R. R. Co.*, 21 Md. 50. Such statutory provisions are constitutional: *Atchison, Topeka & Santa Fé R. R. Co. v. Cochran*, 43 Kans. 225; *Mayor v. Baltimore & Ohio R. R. Co.*, 21 Md. 50; *White v. Syracuse & Utica R. R. Co.*, 14 Barb. (N. Y.) 559; and will validate a purchase of stock previously made: *In re Buffalo, N. Y. & E. R. R. Co.*, 37 N. Y. Suppl. 1048. But the requisite authority need not be express: it may be implied from the nature of the business for the carrying on of which the corporation was created: *Great Western Ry. Co. v. Metropolitan Ry. Co.*, 32 L. J. Ch. 382; *In re Barned's Banking Co.*, 3 L. R. Ch. 105, overruling, *pro tanto*, *Salomons v. Laing*, 12 Beav. 339; *Maunsell v. Midland Great Western Ry. Co.*, 1 H. & M. 130; or from the power conferred upon it. Thus, a construction company engaged in building a railroad may take stock in the railroad company: *In re Application of Rochester, Hornellsville & L. R. R. Co.*, 110 N. Y. 119, affirming 45 Hun, 126; a building corporation may subscribe to the stock of an apartment association: *Fox v. McComb*, 17 N. Y. Suppl. 783; *McComb v. Barcelona Apartment Assn.*, 134 N. Y. 598; one telegraph company may invest in the stock of another: *United States Tel. Co. v. Boston Safe Deposit & Trust Co.*, 147 U. S. 431; a new corporation may buy up the stock of the old one from which it is formed: *Cameron v. N. Y. & M. V. Water Co.*, 62 Hun, (N. Y.) 269; and a corporation authorized to buy up or consolidate with a railroad company, may buy up the stock of the latter: *Tod v. Union Land Co.*, 57 Fed. Rep. 47; *Dewey v. Toledo, A. A. & N. M. Ry. Co.*, 91 Mich. 351. Whether authorized by express provision or by implication, the corporation stockholder stands on the same footing as to rights and liabilities as any other stockholder: *Natl. Bk. v. Case*, 99 U. S. 628; *Citizens' State Bk. of Noblesville v. Hawkins*, 71 Fed. Rep. 369; *Cooper Ins. Co. v. Hawkins*, 71 Fed. Rep.

372; Calumet Paper Co. v. Stotts Inv. Co., (Iowa,) 64 N. W. Rep. 782; Davis v. U. S. Electric Power & Light Co., 77 Md. 35; Oelbermann v. N. Y. & N. R. R. Co., 7 Misc. Rep. (N. Y.) 352; *In re Buffalo*, N. Y. & E. R. R. Co., 37 N. Y. Suppl. 1048; Smith v. Newark, S. & S. R. R. Co., 8 Ohio Cir. Ct. 583; and if it be authorized to buy only a limited amount of stock, it cannot lawfully overstep that limit: Salomons v. Laing, 12 Beav. 339; Great Western Ry. Co. v. Metropolitan Ry. Co., 32 L. J. Ch. 382.

4. Holding Stock as Security.—The ground for denying to a corporation the right to purchase and hold stock in another, is, as has been said, that such a purchase is *ultra vires*—outside of the legitimate scope of the corporate business. If, therefore, the particular transaction is such that it falls within the scope of that business, or if the business itself is of such a nature that it includes the purchase and holding of such stock, the rule does not apply. “Under extraordinary circumstances, it may become necessary for a national bank, or a manufacturing corporation, or a railroad corporation, to acquire stock in another corporation, as in satisfaction of a valid debt, or by way of security, but with a view to its subsequent sale or conversion into money so as to make good or redeem an anticipated loss:” Pearson v. Concord R. R. Corp., 62 N. H. 537, 549. It is therefore now well settled that any corporation may take stock in another corporation as a pledge or security, in payment of a debt that would otherwise probably be lost, or even in exchange for goods that it is authorized to sell: Royal Bk. of India’s Case, 4 L. R. Ch. 252; County Court v. B. & O. R. R. Co., 35 Fed. Rep. 161; Woods v. Memphis & Charleston R. R. Co., (Ala.) 5 Ry. & Corp. L. J. 372; Evans v. Bailey, 66 Cal. 112; White v. G. W. Marquardt & Son, (Iowa,) 70 N. W. Rep. 193; Howe v. Boston Carpet Co., 16 Gray, (Mass.) 493; Milbank v. N. Y., L. E. & W. R. R. Co., 64 How. Pr. (N. Y.) 20; McNab v. McNab & Harlin Mfg. Co., 62 Hun, (N. Y.) 18; Hodges v. New England Screw Co., 1 R. I. 312; Hampton & Branchville R. R. & Lumber Co. v. Bk. of Charleston Natl. Bkg. Assn., (S. Car.) 26 S. E. Rep. 238; and this permission extends to national banks: Shoemaker v. Natl. Mechanics Bk., 2 Abb. (U. S.) 416;

Canfield v. Natl. State Bk. of Minneapolis, 1 Natl. Bk. Cas. 312; Natl. Bk. v. Case, 99 U. S. 628; Baldwin v. Canfield, 26 Minn. 43; and on dissolution, even though insolvent, a corporation may take stock in payment for property sold, if with the intent to sell it again and distribute the proceeds among its own stockholders or creditors: Easun v. Buckeye Brewing Co., 51 Fed. Rep. 156; Byrne v. Schuyler Mfg. Co., 65 Conn. 336. If the name of a pledgee corporation appears on the books of the other as "pledgee," the former will not be liable as a stockholder: Pauly v. State Loan & Trust Co., 58 Fed. Rep. 666.

5. Holding Stock as an Investment.—There are certain corporations whose success depends upon the investment of their funds, and it is accordingly held that these may invest in the stock of other corporations, as in any other form of moneyed security. "Certain classes of corporations, such as religious and charitable corporations, and corporations for literary purposes, may rightfully invest their moneys in the stock of other corporations. The power, if not expressly mentioned in their charters, is necessarily implied, for the preservation of the funds with which such institutions are endowed and to render their funds productive. So, an insurance company or savings bank may rightfully invest its capital or deposits in the stocks of railroad companies, banks, manufacturing companies and similar corporations. The power is necessary to enable them to engage in the business for which they are organized, and hence is implied, if not expressly granted, in their charters. Such investments are in the line of their business:" Pearson v. Concord R. R. Corp., 62 N. H. 537, 549. Further, since most large trading corporations now are, at one time or another, in possession of surplus funds which it is to their advantage to invest, either permanently or temporarily, there is no reason why this form of investment should be denied them; and there is, accordingly, an ever-growing tendency to permit any corporation to invest in the stock of another if it be done *bona fide*, and with no sinister or unlawful purpose, and if it be not contrary to the charter or the business of the corporation: *In re* Barned's Banking Co., 3 L. R. Ch. 105; Booth v. Robinson, 55 Md. 419; Smith v. Newark, S. & S. R. R. Co., 8 Ohio Cir. Ct. 583; *contra*, Joint Stock Dis-

count Co. *v.* Brown, 8 L. R. Eq. 381 ; Cooper Ins. Co. *v.* Hawkins, 71 Fed. Rep. 372 ; Marble Co. *v.* Harvey, 92 Tenn. 115.

6. Purchase of Controlling Interest in one Corporation by another.—The purchase of stock in a corporation under authority, either express or implied, carries with it the right to vote: Davis *v.* U. S. Electric Power & Light Co., 77 Md. 35; Oelbermann *v.* N. Y. & N. R. R. Co., 7 Misc. Rep. (N. Y.) 352; *In re* Buffalo, N. Y. & E. R. R. Co., 37 N. Y. Suppl. 1048. One corporation may therefore acquire the control of another in this way; and as long as it deals fairly by the other, no objection can be raised: Tod *v.* Ky. Union Land Co., 57 Fed. Rep. 47. Thus, in Gloninger *v.* Pittsburgh & C. R. R. Co., 139 Pa. 13, a railroad company, owning the majority of the stock of another, procured the issue of bonds to itself upon sufficient consideration, without using any improper means; and it was held that it was immaterial that the bonds were subsequently used as security to float a loan made for its exclusive benefit. So, a corporation which owns all the stock of another may lease it, and procure the payment of the rental directly to itself: Union Pac. Ry. Co. *v.* Chicago, R. I. & P. Ry. Co., 51 Fed. Rep. 309, affirming 47 Fed. Rep. 15. But a corporation has no greater rights than any other stockholder, and, therefore, when the voting power is or can be used to the detriment of the other stockholders, either intentionally, or as a necessary result of the conflicting interests of the two corporations, the stockholder corporation, or any other majority stockholder, will be enjoined from voting on it, or otherwise using it to oppress the others; and their delay in objecting will not bar their rights: Sumner *v.* Marcy, 3 Woodb. & M. (U. S.) 105; American Refrigerating & Const. Co. *v.* Linn, 93 Ala. 610; George *v.* Cent. R. R. & Bkg. Co., 101 Ala. 607; Marble Co. *v.* Harvey, 92 Tenn. 115. When one corporation acquires a majority of the stock of another, and the two have substantially the same field of operation, so that the profits of one may be enhanced by a diminution of those of the other, or where there is a conflict of interest between the two in the matter of expenditures, or in the division of earnings, the corporation which owns the majority of stock, its agents and employes, and all others acting

in its interest, may be enjoined from voting its stock in the election of officers of the rival corporation, or from exercising the power a majority of stock confers in controlling and governing the corporation: *Memphis & C. R. R. Co. v. Woods*, 88 Ala. 630. Of course, a controlling interest acquired by an *ultra vires* purchase of stock will be restrained from voting: *Clarke v. Cent. R. R. & Bkg. Co. of Ga.*, 50 Fed. Rep. 338; but see *Clarke v. Richmond & W. P. Terminal Ry. & Warehouse Co.*, 62 Fed. Rep. 328.

Corporations—Concentration of Ownership of Stock—Powers of Stockholder—Conveyance of Corporate Property—Dissolution—Laches—Usury—Service of Process.

PARKER v. BETHEL HOTEL CO. ET AL.

(Supreme Court of Tennessee. February 22, 1896.)

(96 Tenn. 252; 34 S. W. Rep. 209.)

The facts that a corporation disposes of that part of its property which is necessary to carry on its business, and never thereafter elects directors, or otherwise exercises its corporate powers, and that one person acquires ownership of all the stock, does not dissolve the corporation.

A stockholder of a solvent business corporation does not, by becoming owner of the entire stock, acquire an equitable estate in real property of the corporation which will entitle him to execute a conveyance thereof in his own name.

By pledging a stock certificate the stockholder divests himself of the equitable as well as the legal title thereto, and the pledgee acquires title, as against the pledgor, notwithstanding he had notice of a provision in the charter of the corporation that no transfer shall be effectual without registration on the books of the company.

A stockholder, having become the owner of the entire stock, and having thereafter claimed and managed the corporate property as his own, pledged different parcels of the stock for loans, which he repeatedly renewed during a period of seven years. *Held*, that the pledgees were not prevented by laches from denying the dissolution of the corporation by non-user of its franchises, and by the centering of ownership of stock in one person, and from having the corporation wound up.

A trustee to whom a debtor conveys stock in a corporation for certain

unsecured creditors is not entitled, on the ground of privity with the debtor, to attack a debt not provided for in the deed, and secured by stock not conveyed, for usury.

Relief against usury will not be granted in equity after a judgment at law on the debt.

A corporation cannot be dissolved in an equitable proceeding brought by its creditors for its winding up.

Service of process in a proceeding to wind up a corporation which had ceased to transact business, upon the last-elected officers of the company, who, by the terms of the charter, held over until the election of their successors, and one of whom owned the entire stock of the corporation, and both of whom appeared and answered, was sufficient to bring the corporation before the court.

Appeal from Chancery Court, Maury county; A. J. ABERNATHY, Chancellor.

Bill by J. Milton Parker and others against the Bethel Hotel Company and others to annul a trust deed, and to dissolve and wind up the defendant corporation. From a judgment of the court of chancery appeals affirming in part, and in part overruling, the decree of the lower court, certain parties appeal. Modified and affirmed.

G. T. Hughes, Fussell & Wilkes, W. S. Fleming, Jr., Granbery & Marks and John T. Williamson, for Parker.

Figuers & Padgett, E. H. Hatcher and W. J. Webster, for Hotel Co.

BRADFORD, Special Judge.—On the 24th day of May, 1880, P. C. Bethel, W. D. Bethel, Lucius Frierson, Eugene Pillow, J. M. Mayes and L. W. Black became incorporated, under the laws of the state of Tennessee, as the Bethel Hotel Company. The business of the corporation, as declared in its charter, was the erection, furnishing and operation of an hotel in the town of Columbia, Tennessee; the hotel building to include storehouses and a concert hall. The charter was taken out under chapter 142 of the acts of 1875, and is in the form prescribed for hotel companies, except that words were added authorizing it to build and

own storehouses and a concert hall. The corporation was duly and regularly organized, with a capital stock of \$100,000, divided into shares of \$50 each. After its organization the building contemplated by the charter was erected on a lot owned by the corporation. The building was so designed and constructed that the part used for hotel purposes was on the second floor, with an entrance on the first floor. The stores were on the first floor, under that part of the building used as an hotel; but the precise situation of the concert hall, or, as it is called the "opera house," does not appear.

The corporation occupied and used the building, or leased it, or both, from the date of its completion until September 1, 1885. On that date the Bethel Hotel Company and Lucius Frierson, for the consideration of \$22,500, payable in ten annual instalments, evidenced by the notes of the purchasers, conveyed to Mayes & Dodson certain parts of the building, particularly described, which were designated as the "hotel proper" part of said building, including the part from the second floor up, and all appurtenances and privileges incident thereto.

The deed to Mayes & Dodson was signed "Bethel Hotel Company, W. D. Bethel, President; Lucius Frierson, Secretary and Treasurer, and Lucius Frierson."

The sale and conveyance to Mayes & Dodson were authorized by the stockholders of the corporation at a meeting held shortly before, at which a majority, but not all, of the stockholders were present or represented. This meeting was the last ever held by the stockholders of the Bethel Hotel Company.

At the time the sale aforesaid was made to Mayes & Dodson, and at the date of the meeting of the stockholders which authorized it, the great majority of the stock of the corporation was owned by Lucius Frierson and by W. D. Bethel, individually and as administrator of the estate of P. C. Bethel, deceased. The holdings of Frierson

amounted to \$34,000, or thereabouts, and those of Bethel to \$61,000.

On the 28th day of August, 1886, Frierson purchased from Bethel all the stock held and owned by him individually and as administrator. Some time, either before or after the purchase of the stock from Bethel—it does not appear which—he acquired such of the stock as was not owned by him or Bethel, and thus became the owner of the entire capital stock of the corporation.

The consideration Frierson paid and agreed to pay Bethel for said \$61,000 of stock was the following: The transfer and assignment to Bethel of the Mayes & Dodson notes, payable to the Bethel Hotel Company, aggregating \$22,500; notes of McEwen & Dale for \$400, payable to Frierson, and his own notes, six in number, for \$658.33 each. To secure the payment of Frierson's notes and the McEwen & Dale notes, and guaranty the indorsement of Frierson and the Bethel Hotel Company on the Mayes & Dodson notes, the stock was left in the possession of Bethel, to whom was reserved "all the power usual to such a pledge in the case of default in payment and satisfaction of said notes." The contract between Frierson and Bethel was in writing.

In September, 1885, immediately after the sale to Mayes & Dodson, and the stockholders' meeting authorizing it, Frierson took possession of the residue of the property of the corporation and used and treated it as his own. He leased it, collected the rents, used them for his purposes, and accounted to no one. He used and controlled the property in this manner, without protest or interference from any one, until January, 1892, when it was conveyed in trust to defendant W. J. Webster, as will hereafter appear.

During this long period of seven years the corporation slept, or was dead, as will be hereafter determined. No meetings of the stockholders and directors were held, no officers were elected, and no business seems to have

been transacted by the corporation. The explanation of this anomalous condition of affairs will be found in the claim made by Lucius Frierson that the corporation had ceased to exist after he acquired all its stock, and that he became and was the real owner of its property. He says and claims that it was understood by the stockholders, at the meeting which authorized the sale to Mayes & Dodson, that the corporation would go into liquidation, and that he, as the owner of all its stock, would become the owner of all its property, and that a resolution to that effect was adopted.

Frierson appears to have been an active trading man. His business required the use of considerable money, and he was compelled to borrow largely from others. Both before and after the date of the alleged resolution of the board of directors putting the corporation into liquidation he made a large number of loans from divers persons. To secure these loans he used as collateral his stock in the Bethel Hotel Company. On May 3, 1882, he borrowed from J. M. Mayes, trustee for Mrs. Annie Jackson and her children, \$4,000, executing his note therefor, and depositing, as collateral to secure the same, one hundred shares of Bethel Hotel Company stock. The note was subsequently renewed, and forty shares more of the stock were added as collateral. This note with the collateral (one hundred and forty shares) attached, came into the hands of G. T. Hughes, who succeeded Mays as trustee. The Second National Bank loaned Frierson \$5,000 on the 2d day of August, 1882, taking his note for that amount, with \$6,000 of the stock of the Bethel Hotel Company attached as collateral. This loan was renewed nine different times. At the date of the last renewal, December 31, 1887, it was increased to \$6,000. The increased loan was renewed from time to time, until it was taken up on December 28, 1891, by A. N. Aiken and W. M. Mayes, who, at Frierson's request, and for his accommodation, executed four notes, three of which were

for \$2,000 each, and one for \$325, (the latter being for interest and discount,) payable to Frierson's order, which notes were delivered to the bank. The hotel company stock on the original loan was retained as collateral on the new notes executed by Aiken and Mayes. It may as well be stated here that these notes were renewed from time to time, and finally, on February 10, 1893, some payments having been made by Aiken, Mayes and Aiken executed their three notes, two of them being for \$2,000 each and one for \$1,700. J. Milton Parker made Frierson a loan in October, 1883, and took as security one hundred shares of the hotel company stock. Payments were made by Frierson, and it was reduced to \$1,994.61, and a note was executed for that amount on November 22, 1891, with the stock attached. Mrs. S. B. Francis loaned Frierson \$4,000 on November 1, 1883. This loan was secured by collateral of some kind, but what it was is not shown. In October, 1884, Frierson substituted for the original security one hundred shares of Bethel Hotel Company stock. There were several payments on and renewals of this loan. The last note in renewal executed by Frierson was for \$2,737, dated April 21, 1891. The hotel stock, one hundred shares, was attached as security. On the 14th day of April, 1892, Mrs. Francis recovered a judgment on said note in the chancery court of Maury county for \$2,901.22, and an order for sale of the stock. The order of sale was not executed. J. W. Frierson, Jr., is the administrator of the estate of Mrs. E. K. Mayes. He discovered, after qualifying, a note of Lucius Frierson for \$1,750, dated April 6, 1886, payable to Mrs. Mayes, with forty shares of Bethel Hotel Company stock attached as collateral. A new note was executed and delivered by Lucius Frierson to the administrator, April 6, 1892, for \$1,890, with the same security. W. B. Wilson holds a note of Frierson for \$1,700, dated April —, 1891, for money loaned. He holds as security thirty shares of the hotel company stock. This note is in renewal of one made

in 1888. On February 10, 1891, Walter Steele loaned Frierson \$2,500, taking his note therefor. To secure this note Frierson pledged fifty shares of the hotel company stock. On July 1, 1891, Frierson reduced the note, by payment, to \$1,500.

On the 12th day of January, 1892, Lucius Frierson conveyed by deed to defendant, W. J. Webster, the real estate owned by the Bethel Hotel Company, and the stock of that company purchased by him from W. D. Bethel. The purpose of said deed was to secure the payment of certain debts owing by said Frierson to sundry parties, aggregating about \$45,000. One of his creditors, W. C. Wooten, was preferred to the amount of \$5,000, but the other creditors were to be paid *pro rata*. The deed directed Webster to take immediate possession of the property, collect the rents, sell the property, and apply the proceeds to the payment of the debts named, in the order stated. Webster accepted the trust and took possession of the property conveyed.

None of the creditors of Frierson who had loaned him money on the stock of the Bethel Hotel Company were provided for in the deed of trust, except Aiken and Wilson, and they only in part. On the 27th day of August, 1892, J. Milton Parker, and the others of said creditors, filed the original bill in this cause against the Bethel Hotel Company, Lucius Frierson, W. J. Webster, trustee, and the creditors provided for in the deed of trust, except Aiken and Wilson.

The purpose of the bill was to annul the trust deed to Webster, have the corporation dissolved and wound up, its property sold, and the proceeds distributed among the holders of its stock as they were entitled. The bill charged that Lucius Frierson had no other interest in the property of the corporation than as a stockholder; that the legal title thereto was vested in the corporation, and had not been divested by the conveyance to defendant, Webster; that they are not disposed to disturb the sale and conveyance to Mayes & Dodson, but insist that the proceeds of that sale

should be equally distributed among the holders of the stock in the corporation, or that the \$61,000 of stock sold by W. D. Bethel to Frierson, and retained by him as security, should, upon an adjustment of the equities among the stockholders, and the final winding up of the affairs of the corporation, stand charged with the amount thereof. It was further charged that since Lucius Frierson had purchased all the stock in the corporation, and become the sole owner thereof, and there had been no meeting of stockholders, and the directors had parted with their stock and ceased to act, the corporation ought to be dissolved, its affairs wound up, its property sold, and the proceeds distributed. Complainants also charged that by virtue of the transfer to them by Lucius Frierson of the stock severally held by them as security, title thereto was vested in them, and that they were entitled to receive all sums and dividends that may be paid or become due on account of said stock, as fully as though they were the absolute owners thereof, to the end that the several debts owing to them by said Frierson, and for the security of which said stock was hypothecated, should be paid. Complainants state that they make no objection to the transfer of the \$61,000 of stock by Bethel to Frierson, but insist that the conveyance thereof by the latter to Webster shall not be so construed as to vest any interest in the real estate of the corporation in Webster, further than as a stockholder in said corporation.

Defendant Webster, as trustee, and on behalf of the beneficiaries named in the trust deed, answered the bill. He says the Bethel Hotel Company erected the building known as the "Bethel Hotel," and owned and operated it until September 1, 1885, when part of it was sold to Mayes & Dodson; that Lucius Frierson owned at that time all the stock in the company, except the shares of the Bethels, which he then purchased; that at that time the corporation went into liquidation and ceased to transact any corporate business; that upon becoming sole owner of all the capital

stock he became the equitable owner of the company's property and assets, took charge of it as his own, gave it in for taxes in his own name, and continued to hold it as his own, adversely to all the world, until he conveyed it to defendant, Webster. It is insisted that all transfers, assignments, and pledges of stock made by Frierson after September 1, 1885, the date of the sale to Mayes & Dodson, and of the "liquidation" of the corporation, were void. As to the transfers and assignments of stock made before that date, it is not claimed that they were illegal; but it is averred that the assigns and holders thereof are estopped to assert any right in the corporate property conveyed to Webster, and are barred of any recovery or relief, because of long delay and laches in asserting or claiming their rights. The statutes of limitations of six and seven years are pleaded and relied on.

Lucius Frierson also answered the bill. His answer is substantially the same as that of his co-defendant, Webster. He says that in September, 1885, he became the owner of the stock of the Bethel Hotel Company, and that it was intended and agreed, when part of the property was sold to Mayes & Dodson, that the company should go into liquidation, and that he should be the owner of the residue not sold, and that thereafter he gave it in for taxes in his own name. He admits that he pledged some of his stock after that date, but says he thought the shares so pledged represented shares or interests in the property of the corporation.

W. D. Bethel also filed an answer. The substance of it is that there was a balance of \$1,640 due him from Frierson on the purchase of the \$61,000 of stock, and that he holds it as security for said balance.

Pending the cause, and before final decree, the following stipulation was entered of record, viz.: "In this cause it was agreed that the case shall be tried as if Wm. J. Webster, trustee, and the creditors represented in the deed of trust

from Lucius Frierson to Wm. J. Webster, had filed a cross bill as of this date against the Second National Bank, J. Milton Parker, and S. W. Warfield, individually and as administrator of Mrs. Francis, and all other complainants, setting out and claiming credit, and to recover usury, as pointed out and indicated in the depositions of S. W. Warfield, Geo. Childress, J. M. Parker, and other complainants, and that it shall be taken as if answered, and all the equities denied, and the plea of the statute of limitations and all other defences made, but shall be determined on the proof and facts as developed in the record, without the necessity of filing a cross bill and answer thereto, this course being taken to facilitate the trial of the cause at this term on its merits."

During the progress of the cause Mrs. S. B. Francis, one of the complainants, died, and the cause was revived in the name of S. W. Warfield, her administrator, and the Second National Bank having suspended and gone into liquidation, the original bill was amended so as to make its receiver, John T. Williamson, a party complainant. Several other amendments were made, not necessary to be mentioned.

The chancellor decreed that the Bethel Hotel Company was not dissolved by the sale of the property to Mayes & Dodson, or the purchase of the stock of W. D. Bethel by Lucius Frierson, or the passage of the resolution by the stockholders authorizing a sale of the property to Mayes & Dodson, but that the property of the corporation, other than that conveyed to Mayes & Dodson, remained the property of the said hotel company, charged with a trust for the payment of its debts, and for distribution among its stockholders; that Lucius Frierson and his assignee, W. J. Webster, were estopped to deny the validity of the certificates of stock held by the complainants, which had been transferred to them by Frierson, and that the holders of said stock were entitled to share in the assets of said corpo-

ration, and were not barred by any statute of limitations, or by any laches on their part. It was further decreed by the chancellor that, in the distribution of the proceeds of sale of the property of the corporation, the stock that had formerly belonged to W. D. and P. C. Bethel, and which had been transferred to Lucius Frierson by W. D. Bethel, personally and as administrator, should be charged with the sum of \$22,500, the amount of the Mayes & Dodson notes which were assigned by him to said Bethel. Frierson was relieved of liability for rents received during the time he had possession of the property. Touching the balance of the debt due W. D. Bethel, as administrator and personally, by Frierson on the purchase of stock from him, it was ordered that the amount should be paid, first, out of the *pro rata* going to said stock in the distribution. This provision of the decree was assented to by all parties.

The chancellor was of the opinion that the Bethel Hotel Company ought to be "wound up and dissolved," and he accordingly so decreed. He also directed that its property be sold and the proceeds distributed. The Bethel Hotel Company owed no debts, and the proceeds of the sale of its property were accordingly ordered to be distributed among the holders of its stock. We will not now stop to state the rulings of the chancellor on the question of usury. They will be adverted to later on.

Special appeals from the chancellor's decree were prayed by W. J. Webster, trustee, and the beneficiaries named in the deed of trust; by the Second National Bank and its receiver, John T. Williamson; and by S. W. Warfield, administrator of Mrs. S. B. Francis, deceased. The nature and extent of the several appeals can best be stated in the words of the decree, as follows: "From so much of said decree as adjudicates that the Bethel Hotel Company was not dissolved in 1885, and that all stock placed as collateral since 1885 were valid claims against the corporation, and all stock before 1885 were not barred by laches of the creditors

holding the same as collateral, and so much of the decree as adjudicates that the Bethel stock should be charged with \$22,500 of the sale to Mayes & Dodson, and so much as adjudicates that W. J. Webster, trustee, and those claiming under him, are not entitled to all of said property, the said M. J. Webster, trustee, and the creditors named in the deed of trust, except, and pray an appeal to the next term of the supreme court, but not in any wise to affect the decree in their favor. To so much of said decree as charges the Second National Bank and John T. Williamson with usury, and reduces the debt of said bank by payments of interest made on said loans, and not allowing interest on said debt, said Second National Bank and John T. Williamson, receiver, pray an appeal to the next term of the supreme court. And to so much of said decree as charges the defendant, S. W. Warfield, administrator, with all interest paid in excess of six per cent. upon his debts, and directs the same to be credited upon said debt as of the date of their payment, the said S. W. Warfield, administrator, excepts, and prays an appeal to the next term of the supreme court."

The case was heard by the court of chancery appeals. That learned court, in an elaborate and extremely able opinion, affirmed the decree of the chancellor in all respects, except his rulings on the questions of usury, and that part of it which directs that the Bethel Hotel Company be dissolved, which were overruled.

It is not claimed that the legal title to the real estate conveyed in the trust deed was in Lucius Frierson at the date of that instrument, or ever was in him. The Bethel Hotel Company, it will be remembered, conveyed all that part of the building adapted to hotel purposes to Mayes & Dodson, leaving several stores and the opera house. It never made any conveyance of the residue of said property, or any part thereof.

It is claimed that the corporation conveyed one of the

stores to the wife of Lucius Frierson. It seems that on the 29th of August, 1886, "W. D. Bethel, president, and Lucius Frierson," made and executed a deed to one of the stores, and the lot on which it was situated, to Mrs. Kate Frierson, the wife of Lucius. According to the testimony of Lucius Frierson, this deed was authorized by the stockholders at the same meeting at which the resolution authorizing the sale of the hotel part of the building to Mayes & Dodson, and directing the liquidation of the corporation, was adopted. But the court of chancery appeals has found as a fact that the deed was executed without the knowledge of Mrs. Frierson, and was never delivered to her. It may be regarded as settled, therefore, that the legal title to the property conveyed to defendant Webster was at the date of that instrument in the Bethel Hotel Company, where it had been, unquestioned and undisturbed, since 1880, the year of its incorporation and organization.

Defendants insist that, although Frierson may not have been invested with the legal title, he nevertheless had such an equitable estate and interest as entitled him to sell and dispose of the property; in other words, that he was the real owner of the property, and as such had the absolute right to use or dispose of it. This alleged equitable estate was not the creation of any deed or written contract executed by the Bethel Hotel Company, or of any corporate act or resolution adopted by the stockholders or directors, which in terms referred to or defined it, but is rather the result and consequence of certain facts and conditions, the existence of which is affirmed by the defendants.

It is said that the Bethel Hotel Company, by the alienation of that part of its property built for and adapted to the uses and purposes of an hotel, deprived itself of the means of conducting an hotel business, and that since 1885, the date of the sale to Mayes & Dodson, it had ceased to exercise its corporate franchises; that the stockholders, at the meeting held in September, 1885, passed a resolution, or

agreed among themselves, that the corporation should go into liquidation; and that Lucius Frierson, being then the owner of all the capital stock of the corporation, became in consequence the equitable owner of all its property, with full power to use it or dispose of it in such manner as he might choose to do. The position of the defendant seems to be that all rights of the corporation in the property were extinguished, that it had ceased to be affected with any corporate uses, and that it belonged absolutely to Frierson.

The facts affirmed by defendants are not, all of them, exactly as found by the court of chancery appeals. It is true that the corporation sold and conveyed the hotel part of its building to Mayes & Dodson, retaining only the stores and opera house, and never afterwards engaged in the business of owning and operating an hotel. Lucius Frierson was not the sole stockholder in 1885, when the hotel was sold, and did not become such until August 28, 1886, when he purchased the Bethel stock. His stock, or a large part of it, at that time, and subsequently, was held as collateral security by other parties. It is not true that a resolution was ever adopted by the stockholders directing the liquidation or winding up of the affairs of the corporation, or that they were ever wound up. The facts, as found by the court of chancery appeals on this point, are stated in its opinion in the following words: "It may be fairly inferred, though it does not distinctly appear in terms in the proof, that, when the deed was made to Mayes & Dodson, it was then understood between W. D. Bethel and Lucius Frierson (they then owning practically all, or nearly all, of the stock) that Bethel should take the proceeds of the sale to Mayes & Dodson, amounting to \$22,500, and a sufficient amount in addition from Lucius Frierson, personally, to make \$30,000, and for this he would transfer his stock, \$61,000, to Frierson, and that this arrangement was consummated, so far as it could be done without direct corporate action of the corporation itself, by the paper of August 28, 1886, made by

Bethel to Frierson; and this is what they understood by the resolution to go into liquidation, there being no debts due by the corporation; and, following out this idea from the date of the sale to Mayes & Dodson, Lucius Frierson proceeded to treat the property as his own, on the idea that he himself constituted the corporation. We do not think that he entertained the idea that the corporation was defunct, but simply that he was himself the corporation, and could do what he wished with the assets."

In considering the position of the defendants, that Frierson became the equitable owner of the assets of the corporation, we must therefore leave out of view the idea that there was any corporate action looking to a dissolution of the corporation and winding up of its affairs. Frierson's estate or interest in the property, if he had any, rests on the postulate that in consequence of the non-user of its franchises, and his sole proprietorship of all its capital stock, the corporation was dissolved, and he became the equitable owner of all its property.

A corporation can be dissolved, and its existence wholly terminated, only by the extinguishment of the corporate franchises conferred by the state. An ordinary business corporation, where its charter specifies no definite time for its continuance, may sell its property and wind up its affairs whenever a majority of its stockholders may deem it advisable: *Treadwell v. Manufacturing Co.*, 7 Gray, (Mass.) 393; *Black v. Canal Co.*, 22 N. J. Eq. 130, 416. But the franchises conferred upon the stockholders by the state are not extinguished by the cessation from business thus brought about: 2 Mor. Priv. Corp. § 1004. In the case of *State v. Butler*, 86 Tenn. 614, 628, 8 S. W. Rep. 586, this court said the mere insolvency of a corporation would not work a dissolution, nor would the assignment of all its property nor the appointment of a receiver extinguish the franchises with which the company had been invested, where there had been no proceedings for forfeiture inaugurated by the

state, nor surrender by act of the stockholders. And so, also, the omission to elect directors or other corporate officers does not of itself work a dissolution of a corporation. The board of directors or other managers or officers do not form an integral part of a joint-stock corporation, and therefore the omission to elect them operates to suspend the powers of the corporation for the time being, since it cannot act without them, but a subsequent election will restore its functions: *Rose v. Turnpike Co.*, 3 Watts, (Pa.) 46; *Manufacturing Co. v. Langdon*, 24 Pick. (Mass.) 49. And where the charter of a corporation, as in the present case, expressly provides that, in case of the failure to elect directors at the prescribed time, the old directors shall continue in office until their successors are elected, it is unavoidably true that the corporation will not be dissolved: *Slee v. Bloom*, 5 Johns. Ch. (N. Y.) 366; *Cahill v. Insurance Co.*, 2 Doug. (Mich.) 124; *Lehigh Bridge Co. v. Lehigh Coal & Nav. Co.*, 4 Rawle, (Pa.) 9.

Nor is a corporation *ipso facto* dissolved by merely neglecting to exercise its corporate powers, so long as the possibility remains of resuming them: *Iron Co. v. Gleason*, 24 Vt. 228; *Russell v. M'Lellan*, 14 Pick. (Mass.) 63; *Attorney-General v. Bank of Niagara*, Hopk. Ch. (N. Y.) 354. And the sale or disposal by a corporation of its real property, though it have the effect of substantially destroying the object for which it was created, does not of itself work its dissolution: *New Jersey Zinc Co. v. New Jersey Franklinite Co.*, 13 N. J. Eq. 322, 335; *Brinckerhoff v. Brown*, 7 Johns. Ch. (N. Y.) 217; *Barclay v. Talman*, 4 Edw. Ch. (N. Y.) 123. Thus, it has been held that suspending active operations, resolving to go into liquidation, depositing with the United States treasurer money to redeem its outstanding circulation, and receiving a reassignment of its bonds, are acts insufficient to operate as a final dissolution of a national bank: *Ordway v. Bank*, 47 Md. 217. In *Bache v. Nashville Horticultural Soc.*, 10 Lea, (Tenn.) 436,

443, it was said that "the non-user of its franchises by a corporation will not alone work a dissolution, or affect the title or right of its property." And in *Maryville College v. Bartlett*, 8 Baxt. (Tenn.) 231, it was held that the non-user by the trustees of a corporation of its franchises and property did not affect the title of the corporation.

Admitting it to be true, as claimed, that Frierson was the owner of all the stock of the corporation, it by no means follows that the corporation was thereby dissolved and forfeited its franchises. On this question the latest text writer on corporation law has this to say, viz.: "Contrary to early opinion, it is now generally held that the fact that all the shares in a joint-stock company have passed into the hands of two members, or even into the hands of a single person, does not, *ipso facto*, work a dissolution of the corporation, since such sole owner may so dispose of the shares as, by the election of the necessary directors and officers, to continue the corporate existence:" 5 Thomp. Corp. § 6653. And in 2 Mor. Priv. Corp. § 1009, it is said: "It is well settled that all the shares of a corporation may be held by a single person, and yet the corporation continue to exist; and, if the charter or by-laws should require certain acts to be done by more than one shareholder, the sole owner may transfer a portion of his shares to other persons, so as to conform to the letter of the rule." It has been held that a corporation which has sold all its assets, with the intention of putting an end to its business, whose officers had all resigned, and whose stockholders had all transferred their shares to a single person, was nevertheless not dissolved, and that its existence could be terminated only by judgment of forfeiture, or by surrender accepted by the state: *Russell v. M'Lellan*, 14 Pick. (Mass.) 63, 70; *Manufacturing Co. v. White*, 42 Ga. 148; *Baldwin v. Canfield*, 26 Minn. 43, 1 N. W. Rep. 261.

The dissolution of a pecuniary or business corporation is effected in one of the following ways, viz.: (1) by the ex-

piration of its charter; (2) by act of the legislature, where power is reserved for that purpose, or there is no constitutional inhibition; (3) by surrender of charter, which is accepted; (4) by forfeiture of the franchises and judgment of dissolution, pronounced by a court having jurisdiction: 2 Mor. Priv. Corp. § 1004; Tayl. Priv. Corp. § 430. It is not pretended that the Bethel Hotel Company was dissolved in either of the ways indicated. The charter of the corporation has not expired, neither has it been repealed by the legislature, nor been surrendered to the state by its members or stockholders. It may be true that there was a non-user of its franchises by the corporation for a period of seven years or more, occasioned by the sale of the only property it owned which could have been used for hotel purposes. Undoubtedly, the non-user of its franchises by a corporation is ground for dissolution and forfeiture of its charter, at the instance of the state; but until sentence of dissolution has been pronounced by a court of competent jurisdiction, in a proper proceeding instituted for the purpose, the corporation will continue to exist, notwithstanding its failure to use its franchises. And forfeiture can only be decreed in a proceeding directly instituted for the purpose by the state granting it: Mill. & V. Code, § 1712; *State v. Butler*, 15 Lea, (Tenn.) 104, 110; *Jersey City Gaslight Co. v. Consumers' Gas Co.*, 40 N. J. Eq. 427; *Broadwell v. Merritt*, 87 Mo. 95. Until dissolution has been thus judicially pronounced, neither the existence of the corporation, nor its title to its property, can be questioned collaterally. We are bound to conclude, therefore, that the Bethel Hotel Company was not dissolved, or its franchises extinguished, for any of the reasons alleged by the defendants, and that it is now a corporation indued with life, with authority to own property and exercise all the powers conferred on it by its charter.

Defendants insist that the alleged equitable estate of Lucius Frierson in the property of the Bethel Hotel Com-

pany did not depend alone upon the dissolution of the corporation, but resulted also from the fact that he was the sole owner of all its capital stock. The proposition is that, if one person owns all the shares of stock of a corporation which owes no debts, he, in virtue of such ownership, becomes the equitable owner of all its property, or at least may sell and dispose of it by deed, if he choose to do so. This proposition is argued by counsel for defendants with force and ability, and is supported by some authority. It has found favor with the supreme court of Maryland: *Swift v. Smith*, 65 Md. 428, 433, 5 Atl. Rep. 534. But the decision of that learned court is opposed by the current of authority, and seems to us to overlook and ignore certain principles that are fundamental.

A corporation and its shareholders are distinct legal entities. In *Keith v. Clarke*, 4 Lea, (Tenn.) 718, this court held that, notwithstanding the state owned all the stock in the Bank of Tennessee, "the bank and the state are entirely different legal entities;" and in *Lillard v. Porter*, 2 Head, (Tenn.) 177, it was said: "Stockholders are totally distinct from the corporation." Important consequences result from this rule. The shareholders are neither responsible for the debts, nor for the torts of the corporation. In the absence of special circumstances, the shareholders cannot be parties, either plaintiffs or defendants, in actions respecting corporate rights, nor have they any title or direct interest in the property of the corporation.

"Shareholders," says Thompson, "are not joint tenants, or in any other sense co-owners of the corporate property, either before or after its dissolution. The title to it rests exclusively in the legal entity called the corporation. A share of the capital stock merely gives the right to partake, according to the amount put into the fund, of the surplus profits of the corporation, and ultimately, on the dissolution of it, of so much of the fund thus created as remains unimpaired, and is not liable for the debts of the

corporation :” *Thomp. Corp.* § 1071. As the shareholders have no direct interest in the corporate property, they cannot convey the real estate of the corporation, though all join in the deed.

In *Wheelock v. Moulton*, 15 Vt. 519, REDFIELD, J., stated the reasons for the rule in his usual clear and accurate style. In that case, Moulton and Hutchinson, sole proprietors and owners of all the stock of a corporation, conveyed its real estate, in mortgage, to secure the repayment of money borrowed of the plaintiff, Wheelock. He brought suit to enforce his mortgage. Judge REDFIELD said: “The fact that the signers of this deed owned the whole of the shares will make no difference in regard to the necessity of a vote of the corporation in order to convey the land. The title to the land was in the corporation, not in the individual shareholders. The deed of one or of any number of the stockholders will not affect the title to the land. The share owners are not tenants in common of the land. They have no title whatever to any of the property of the corporation. It is true that one who owned all the shares might control the corporation, and so he could if he owned a majority of the shares; but he could in either case do it only by a vote of the corporation at a meeting held in strict accordance with the statutes of the corporation.” And in *Humphreys v. McKissock*, 140 U. S. 304, 11 Sup. Ct. Rep. 779, Mr. Justice FIELD, discussing the same question, said: “The property of a corporation is not subject to the control of individual members, whether acting separately or jointly. They can neither encumber nor transfer that property, nor authorize others to do so. The corporation—the artificial being created—holds the property, and alone can mortgage or transfer it; and the corporation acts only through its officers, subject to the conditions prescribed by law.” A very instructive case on this question is *Baldwin v. Canfield*, 26 Minn. 43, 1 N. W. Rep. 261. The facts of that case were very similar to those of this case, and the direct question

now under consideration was passed upon. The opinion of the court was in accordance with the cases above cited. See, also, *Button v. Hoffman*, 61 Wis. 20, 20 N. W. Rep. 667.

We are thus led, both by reason and authority, to the conclusion that Lucius Frierson, as sole stockholder of the Bethel Hotel Company, had no title, legal or equitable, to its property. The title to the property was in the Bethel Hotel Company, and could only be conveyed by it. The conveyance of its real estate is one of the most solemn acts of a corporation, and it can only be done in pursuance of a vote of the corporation, and by deed executed in the form and mode prescribed by law: *Thomp. Corp.* § 5096. At common law a corporation could not execute a deed to realty, except under seal; and the general corporations act of 1875, under which the Bethel Hotel Company was organized, provides that, if the corporation have no seal, it shall be bound by the signature of its name by a duly-authorized officer.

To have made a valid conveyance of the real estate of the company, it was necessary, therefore, that the deed should have been executed in the name of the corporation, under seal, if it had one; and, if not, its name should have been signed by an agent duly authorized by its governing agency, its board of directors: *Garrett v. Land Co.*, 94 Tenn. 459, 29 S. W. Rep. 726. As we have seen, nothing of this kind was done. The deed to defendant Webster was executed by Lucius Frierson in his own name, and under his own signature. The Bethel Hotel Company, although it owned the property, was in no sense a party to it. For this and other reasons given, the deed of Lucius Frierson, conveying the real estate of the Bethel Hotel Company to defendant W. J. Webster was void, and conveyed to him no title or interest therein.

We have assumed as a fact, in the preceding discussion, that Lucius Frierson was in truth the sole owner of all the shares of stock of the Bethel Hotel Company at the date he

executed the deed to Webster. But was he? It will be remembered that Frierson assigned most of his stock in the Bethel Hotel Company to complainants, as security for money borrowed of them by him. Some of the loans were made before September 1, 1885, the date of the conveyance to Mayes & Dodson, and the time, it is claimed by him, that the resolution directing the liquidation and winding up of the corporation was passed; and some of them were made subsequently. All of the loans and transfers of stock were made prior to the date of Frierson's deed to Webster. The stock owned by W. D. Bethel, personally and as administrator, was never transferred to him in fact. It was retained by W. D. Bethel as security for the payment of the purchase money agreed to be paid therefor by Frierson in the contract of August 28, 1886, between them. The certificates of stock had attached to them blank transfers and powers of attorney in the usual form. All of the certificates were not issued in the name of Lucius Frierson. He purchased from different persons, and, when they assigned their shares to him, they signed the transfers and powers of attorney. Frierson seems not to have surrendered the certificates and taken from the corporation others in his own name, but, when he pledged them as collateral, simply transferred them by delivery.

For the purposes of defence, defendants have separated the complainants into two classes, viz.: those who acquired stock before September, 1885, the date of the alleged dissolution of the corporation, and those who acquired stock after that date. As to the latter, it is argued that, the corporation being dissolved, transfers of stock to them were inefficacious, and conveyed no interest. But this argument is built upon a false predicate. There was no dissolution of the corporation. The argument therefore falls to the ground. As to those of complainants who obtained certificates of stock before September, 1885, it is said, they took them with notice of a by-law of the company that no transfer of

stock would be good unless made on the books of the company, and, the by-law not having been complied with, the transfers were void. It is not claimed by complainants that transfers of the stock to them were made on the books of the company. Indeed, two of the complainants, Steele and Wilson, hold their certificates by simple delivery, Frierson, in whose name the certificates were made out, not having signed the transfer and power of attorney on the back. Although it is claimed that there was a by-law of the company requiring transfers on the books, it is probably no more than a presumption from the words on the certificates. But it may be assumed that there was such a by-law. A sale or transfer of stock, to be valid, need not be in writing. The certificate need not, in fact, be delivered. A transfer is perfectly good, although the seller of the stock never had a certificate at all, and although no certificate is issued to the transferee. An indorsement on the certificate, while not necessary, is the preferable and most convenient form of transfer, because the same instrument then combines the evidence of the seller's right to the stock, and of his transfer to the purchaser: Lowell, Stocks, §§ 43, 44.

There is no longer any doubt that the transfer and assignment of certificates of stock in a corporation, either by absolute sale or by way of pledge or security for debt, passes to the vendee or pledgee the title thereto: *Cornick v. Richards*, 3 Lea, (Tenn.) 25; *Cherry v. Frost*, 7 Lea, (Tenn.) 1; *West Nashville Planing-Mill Co. v. Nashville Sav. Bank*, 86 Tenn. 252, 6 S. W. Rep. 340; *Caulkins v. Gaslight Co.*, 85 Tenn. 683, 4 S. W. Rep. 287. Provision in the by-laws of the corporation, requiring the transfer to be made on the books of the company, is solely for the benefit of the corporation. When shares of stock are transferred, there is a complete substitution of one person for another in all the rights and duties attaching to the interest forming the subject of their contract. An entry on the books is not necessary to vest the vendee with all the title which the vendor

had. By the sale and assignment, the vendor divests himself of not only the equitable, but the legal title; and this principle applies, notwithstanding a provision in the charter or by-laws that no transfer shall be complete or effectual without registration: 1 Spell. Priv. Corp. § 498.

In *Smith v. Railroad Co.*, 91 Tenn. 221, 238, 18 S. W. Rep. 546, LURTON, J., says: "The rule requiring transfer on the books of the company, by the well-settled line of decisions in this state, and by the great weight of authority in the courts of America, is a rule made solely for the benefit of the company. By it the company is enabled to know who are entitled to vote, and to whom to pay dividends." The title of the transferee is perfect, as between himself and the former holder; and he is entitled, upon presentation to the corporation of his certificate, to have himself registered on its books as the real owner. It is inchoate as to the corporation only until the transfer and registry on the books of the corporation have been made. What are the possible consequences of an omission to register the transfer of stock on the books of a corporation, it is unnecessary here to inquire, because nothing was done by the Bethel Hotel Company which in any way affected the rights of those holding the stock, and complainants, as the assignees of Frierson, acquired such title to and interest in the stock as could not be affected or impaired by any act or omission of his.

Defendant Webster, both for himself and for the other defendants represented by him, relies in his answer upon laches as a defence to the relief asked by those of the complainants who obtained the certificates of stock they hold prior to September, 1885. It is difficult to see how this defence can avail them. It is argued that Frierson having claimed, used and managed the property of the Bethel Hotel Company as his own, with the knowledge of complainants and without objection from them, for about seven years before the institution of this suit, they are subject to

the imputation of laches, and cannot, for that reason, have relief.

“It is an old principle that a court of equity will not enforce stale demands where a party has slept on his rights and acquiesced for an unreasonably long time. Laches and neglect are always discountenanced:” Lord CAMDEN, in *Smith v. Clay*, 3 Brown Ch. 639, note. The doctrine rests upon the broadest principles of equity. Lapse of time obscures all human evidence, and often makes it impossible to discover the truth. Where the chances of establishing the truth are greatly impaired by lapse of time, it would be obviously unjust to enforce a demand after many years of acquiescence and delay. And so, where a party had done something, or had spent money or altered his situation in the belief, generated by the delay and acquiescence of his adversary, that he had the right so to act, a court of equity will not interfere. But delay alone, unaccompanied by other circumstances, will not necessarily preclude relief. In every case where the defence is founded on mere delay, that delay, of course, not amounting to a bar of any statute of limitations, the validity of that defence must be tested upon principles substantially equitable. Two circumstances, always important in such cases, are the length of the delay and the nature of the acts done during the interval which might affect either party, and cause a balance of justice or injustice in taking one course or the other, so far as relates to the remedy.

The doctrine of laches, as understood in courts of equity, implies injury to the party pleading it as a defence. Where the situation of the parties has not been altered, and one has not been put in a worse condition by the delay of the other, the defence of laches does not generally apply. In *Paschall v. Hinderer*, 28 Ohio St. 568, 580, it was said: “What constitutes a stale equity is a vexed question, hardly susceptible of an accurate definition. Length of time alone is not a test of staleness.”

“Laches,” says the supreme court of Virginia, “in the assertion or prosecution of a claim, is not always enough to defeat it. The laches must be such as to afford a reasonable presumption of the satisfaction or abandonment of the claim, or such as to prevent a proper defence by reason of the death of parties, loss of evidence, or otherwise:” *Tazewell’s Ex’r v. Saunders’ Ex’r*, 13 Gratt. (Va.) 354, 362.

In *Wollaston v. Tribe*, 9 L. R. Eq. 44, 50, a bill was brought in 1868 to set aside a marriage settlement executed in 1858 on the ground of fraud and mistake. Lord ROMILLY, M. R., said: “Great stress was laid on the lapse of time, but I think nothing of that, because all the persons are in the same state now as they were then. If there had been any dealing with an altered state of matters, that might have raised a question, but there is nothing of that sort.” So, in the present case, we are not dealing with “an altered state of matters.” The status is unchanged. Frierson was not induced to do anything or to omit anything to his hurt by the alleged acquiescence or delay of complainants. In truth, it seems to us that Frierson’s use and management of the company’s property was in no sense inconsistent with the rights of complainants as transferees and holders of its stock. His repeated renewals of the debts for which the stock was pledged were a recognition on his part of the continued existence of the corporation and of its title to the property. Its property was what gave value to the stock, and it was undoubtedly in reliance on the continued ownership thereof by the Bethel Hotel Company that the complainants consented to renew their loans and retain the stock as collateral.

After what has been said, it is hardly necessary to notice the plea of the statute of limitations interposed by defendants. There are a number of assignments of error by defendants, based upon the idea that the Bethel Hotel Company

was dissolved. It suffices to say that, having found that the corporation was not dissolved, these assignments must be overruled.

The debts of the Second National Bank and of S. W. Warfield, administrator of Mrs. Francis, were attacked by defendant Webster for usury. The notes held by the bank were executed by Aiken and Mayes, but the debt was really owing by Lucius Frierson. These gentlemen were original indorsers, but after a number of renewals of the paper and some payments, Frierson became insolvent, and they then executed their own notes for the balance without his name appearing on them. It was understood by all parties, however, that the debt was Frierson's. It was found to be a fact that interest had been paid on both debts in excess of the legal rate. As to the debt due the Second National Bank, the chancellor decreed that by charging and accepting usury the bank had forfeited all right to interest, and the payments made by Frierson on account of interest were applied in reduction of the principal. The chancellor decreed, also, that the usurious interest paid on the Francis debt should be applied on the principal. The chancellor was wrong. It is settled by a multitude of decisions that the right to plead usury is a privilege personal to the debtor: 27 Am. & Eng. Enc. Law, 949, note 4. In one case the defence of usury was likened to that of infancy: *Ransom v. Hays*, 39 Mo. 445.

The exception to the rule stated embraces the debtor's sureties, guarantors, heirs, devisees and personal representatives, and they are permitted to plead usury on the grounds of privity or common interest: *Cole v. Hills*, 44 N. H. 227; *Loomis v. Eaton*, 32 Conn. 550; *Goodhue v. Palmer*, 13 Ind. 457; *Cramer v. Lepper*, 26 Ohio St. 59; *Merchants' Exch. Natl. Bank v. Commercial Warehouse Co.*, 49 N. Y. 635. In the last case the exception to the general principle is stated in these words: "All privies to the borrower, whether in blood, representation or

estate, may, both in law and equity, by the appropriate legal and equitable remedies and defences, attack or defend against any contract or security given by the borrower which is tainted with usury, on the ground of such usury, where such contract or security affects the estate derived by them from the borrower." It would seem that an assignee under a deed of trust for the benefit of creditors, or an assignee in bankruptcy, would fall within the exception, and could plead usury to a debt which was entitled to participate in the assets conveyed to them, on the ground of privity in estate: *Stein v. Swensen*, 44 Minn. 218, 222, 46 N. W. Rep. 360; *Nance v. Gregory*, 6 Lea, (Tenn.) 343. By Code, § 2712, a judgment creditor is also allowed to sue for and subject usury paid by his debtor to the satisfaction of his debt. But no other than a judgment creditor can do so: *McKinney v. Hotel Co.*, 12 Heisk. (Tenn.) 104.

The exception does not seem to have been extended beyond the limits above indicated. The reason and policy of the statute against usury is the protection of borrowers against the oppressive exactions of money-lenders; and, to promote and sustain that policy, it is not necessary that other persons than the victim, or those standing in legal privity with him, should be given the benefit of the statute. Defendant Webster does not fall within the exception to the general rule that a debt can be purged of usury only by the debtor. He is not a creditor of Frierson, but simply a trustee for certain creditors, none of whom appear to be judgment creditors. He is not such an assignee as, upon the ground of privity with the assignor, might have the right to attack a debt for usury. He holds, as assignee, no property chargeable with the payment of the usurious debts in common with other debts. If the debts owing to the Second National Bank and Mrs. Francis were included in the deed of trust to Webster, it might be his duty to relieve the trust property to the extent of the usury paid on those notes. The assignee in such case holds the trust property for the benefit

of the creditors named in the assignment, and it might be his duty to them to protect it from illegal burdens. But, as we have seen, the deed of trust executed by Frierson conveyed to Webster nothing except his interest in the W. D. Bethel stock. Webster became thereby the assignee of \$61,000 of stock in the company for the benefit of the creditors named in the trust-deed, but acquired no interest in the property of the corporation itself. Neither did he acquire any interest in the surplus value of the stock held by the bank and Mrs. Francis as security for their debts. That belonged to Frierson. It was a matter of no concern, therefore, to Webster, trustee, whether the debts of the bank and Mrs. Francis were tainted with usury or not. The amount going to him, as assignee of the Bethel stock, upon a final winding up of the Bethel Hotel Company and distribution of its assets among the stockholders, could not be affected one way or the other by the fact that the debts of the bank and Mrs. Francis were tainted with usury. Any surplus that might remain after paying them in full would go to Frierson. It is clear, therefore, that Frierson alone was interested, and no one but him could raise the question of usury, and this he has not done. There is also another ground upon which it must be held that the debt of Mrs. Francis cannot be attacked for usury. This debt was reduced to a judgment in April, 1892. It has been held in this state that relief against usury will not be granted in equity after a judgment at law upon the debt. If the debtor has had his day in court, and failed or neglected to set up the defence of usury, the judgment is final and conclusive: *McKoin v. Cooley*, 3 Humph. (Tenn.) 559; *Goff v. Dabbs*, 4 Baxt. (Tenn.) 300.

It is hardly necessary to add, after what has been said, that the chancellor was in error when he decreed that the Bethel Hotel Company be dissolved. He had no power in this case to decree a dissolution. That could be done only in a suit instituted by the state for the purpose. The most

that the chancellor could do was to wind it up and distribute its assets.

It was thought by the court of chancery appeals that the Bethel Hotel Company had not been brought before the court by proper service of process; and it being deemed necessary, for complete relief, that this should be done, it was ordered that steps be taken, on the remand of the cause to the chancery court of Maury county, to bring the company before the court. We think the court of chancery appeals is mistaken. The Bethel Hotel Company has been sufficiently served with process, and is now before the court. The executive officers of the company last elected were W. D. Bethel, president, and Lucius Frierson, secretary. They hold over until the election of their successors, and were the president and secretary, respectively, of the company, when the original bill was filed, and are yet. Process was served on them, and they have severally filed their answers. We think service of process on them was all that could be had, and must be regarded as having been made on them officially as well as individually. We hold, therefore, that the Bethel Hotel Company was properly before the court. In all other respects the decree of the court of chancery appeals is affirmed. The cause will be remanded to the chancery court of Maury county for further proceedings.

RIGHTS OF SOLE OWNER OF CORPORATE STOCK.

1. Incorporation by one Person.—In the absence of express statutory provision to the contrary, one person may form a corporation for any of the purposes allowed by law, by subscribing to all of the stock himself; but under the statutes requiring a certain number of persons to sign the articles of incorporation or the application for a charter, a corporation sole cannot be created in this way; and no incorporation will be valid unless it be effected by the requisite number of incorporators: *Louisville Bkg. Co. v. Eisenman*, 94 Ky. 83. Any attempt to evade these provisions amounts to a fraud on the public; and any

incorporation which, though apparently regular, is in effect such an attempt, will be null and void. Thus, in *Chicago & G. T. Ry. Co. v. Miller*, 91 Mich. 166, one Bancroft, the receiver of two railroad companies, desiring to connect the roads, caused another railroad company to be organized, and became one of the stockholders. None of the stockholders paid anything on their stock, but it was claimed that Bancroft paid the proportion of the capital stock required by statute before the corporation could transact business. Bancroft subsequently made a contract with the fiscal agent of the company by which he was to receive all the bonds and stock of the company, except twenty-five shares not issued, in consideration of building the road-bed and bridges and furnishing the rails, ties and planking. No provision was made for side-tracks, switches, water-tanks, stations or rolling-stock. The contract provided that the right of way, if not procured by the company, should be acquired by Bancroft, and that he should receive \$1,000 per mile therefor, but no bonds, money or stock was left with which the company could procure the right of way. Upon these facts, it was held that Bancroft was the company; that he really made the said contract with himself, and that the whole scheme was a fraud on the statute authorizing the organization of railroad companies.

2. Purchase of all Stock by one Person after Incorporation.—After a corporation has once been legally created, there is no principle of law that limits the acquisition of its stock, if the statute law is silent; and that stock may be purchased and held by less than the number required to incorporate, who may, under express or implied permission from the legislature, exercise all the corporate powers and act for and bind the corporation: *Day v. Stetson*, 8 Me. 365; *Penobscot Boom Corp. v. Lamson*, 16 Me. 224. A corporation, therefore, is not *ipso facto* dissolved by the concentration of its stock in the hands of one or two persons; and if they continue the business in the corporate name they are still liable to be sued as a corporation: *Newton Mfg. Co. v. White*, 42 Ga. 148; *State v. Vincennes Univ.*, 5 Ind. 77; *Louisville Bkg. Co. v. Eisenman*, 94 Ky. 83; *Russell v. M'Lellan*, 14 Pick. (Mass.) 63; *Bohannon v. Binns*, 31 Miss.

355; *Harrington v. Connor*, (Neb.) 70 N. W. Rep. 911; *Wilde v. Jenkins*, 4 Paige Ch. (N. Y.) 481; *Smith v. Smith*, 3 Desaus. Ch. (S. Car.) 557; *Button v. Hoffman*, 61 Wis. 20; *contra*, *Bellona Company's Case*, 3 Bland Ch. (Md.) 442. So, if the only two stockholders of a corporation agree to contribute equally to the expense of carrying out work undertaken by it, and one of them afterwards refuses to perform the agreement, the corporation is not thereby dissolved: *McKay v. Beard*, 20 S. Car. 156. The corporation being thus a going concern, the acts of a sole stockholder in its name are its acts as far as innocent third parties are concerned; and, consequently, a receipt issued in the name of a corporation, and signed by one who owned all the stock, is admissible in evidence to prove the fact that the corporation was doing business at the time the receipt was given; and an advertisement signed by a collector under instructions from the owner of all the stock is admissible for the same purpose: *Orr Water Ditch Co. v. Reno Water Co.*, 19 Nev. 60. But though the corporation is not dissolved by the acquisition of its stock by one person, yet, if that acquisition interferes with the regular organization of the corporation, (*e. g.*, when the directors are required to be stockholders,) it will operate as a suspension of the franchise until enough stock is re-transferred to others to form a valid organization: *Swift v. Smith*, 65 Md. 428. "While we recognize the general rule on the subject sustained by the authorities referred to, it must be held that the purchase by one of all the shares in a corporation *created under the statute* is a dissolution of the corporation to the extent that it suspends the exercise of the rights under the franchise until the owner transfers the stock, in good faith, so as to maintain an organization under the statute. There is a difference between the attempt to create one person a corporation under this statute, and the purchase, in good faith, of all the stock after the corporation has been created. In the first instance there is no corporation, and in the last there is a franchise, the operations of which are suspended until the stock may be transferred to others; and while in the hands of one person, the corporate and individual property are ordinarily alike liable for the payment of any debt contracted by the owner, and subsequent purchasers of stock take it subject to the liens or equities of the creditors

of the sole owner created prior to the transfer of the stock to them :” Louisville Bkg. Co. v. Eisenman, 94 Ky. 83.

3. Rights and Powers of Sole Stockholder.—Since the corporation is not dissolved by the acquisition of all of its stock by one person, but remains a distinct entity: Keith v. Clarke, 4 Lea, (Tenn.) 718; the holder of the stock does not become so identified with it that he can bind it by a contract made in his own name on its behalf: Allemong v. Simmons, 124 Ind. 199; Donoghue v. Indiana & L. M. Ry. Co., 87 Mich. 13; though it will be bound thereby, as regards his interest: Des Moines Gas Co. v. West, 50 Iowa, 16; and as regards the interest of his vendee with notice: Millsaps v. Merchants' & Planters' Bk., 71 Miss. 361; and he does not become vested with the legal title to the corporate property. That still remains in the corporation, and all that he has is an equitable interest. He cannot, therefore, by a conveyance in his own name, transfer a legal title to that property to others, even where there are no creditors whose interests might be affected; and *a fortiori* he cannot dispose of it to secure his individual debt, to the prejudice of creditors: Durant v. Kennett, 5 L. R. C. P. 262; Hopkins v. Roseclare Lead Co., 72 Ill. 373; Baldwin v. Canfield, 26 Minn. 43; Frank v. Drenkhahn, 76 Mo. 508; Harrington v. Connor, (Neb.) 70 N. W. Rep. 911; Wilde v. Jenkins, 4 Paige Ch. (N. Y.) 481; Bundy v. Iron Co., 38 Ohio St. 300; Gulf, C. & S. F. Ry. Co. v. Morris, 67 Tex. 692; Wheelock v. Moulton, 15 Vt. 519; Stewart v. Gould, 8 Wash. 367; Murphy v. Hanrahan, 50 Wis. 485; Button v. Hoffman, 61 Wis. 20. For the same reason he is not entitled to sue in his own name on a cause of action belonging to the corporation: Fitzgerald v. Mo. Pac. Ry. Co., 45 Fed. Rep. 812; Randall v. Dudley, (Mich.) 69 N. W. Rep. 729; the latter is still the proper party plaintiff: Winona & St. Peter R. R. Co. v. St. P. & Sioux City R. R. Co., 23 Minn. 359. So, two purchasers of all the stock of a corporation are neither partners, joint tenants nor tenants in common: Russell v. M'Lellan, 14 Pick. (Mass.) 63. But though a holder of all but two shares of the stock cannot mortgage the corporate property: England v. Dearborn, 141 Mass. 590; a mortgage of that property by a sole stockholder has been upheld as creating a valid

equitable lien: *Swift v. Smith*, 65 Md. 428; and a sole stockholder may, as against a stranger, take a transfer of all the corporate property in consideration of the surrender of his stock: *Wagner v. Marple*, 10 Tex. Civ. App. 505. When a depositor has an open account in a bank in his own name, and another in the name of a corporation, which is simply himself under another name, the bank does him no harm by crediting deposits intended to be credited to one account to the other, and will not be liable therefor: *Rennyson v. People's National Bank*, 4 Pa. Super. Ct. 640. Further, if it does not appear that the corporate name under which the sole stockholder does business in fact represents a corporation, a conveyance by him of personal property sold to the corporation, for which he gave his own note, is good without evidence of a transfer of the property by the corporation to him: *Simpson Brick Press Co. v. Wormley*, 61 Ill. App. 460, affirmed, 46 N. E. Rep. 976.

4. Rights as Creditor.—Though, under ordinary circumstances, stockholders who are also creditors are entitled to share in the assets of a corporation *pro rata* with other creditors, a sole stockholder will be postponed to the claims of others; and a firm of which he is a member will likewise be postponed. Thus, in *Potts v. Schmucker*, (Md.) 36 Atl. Rep. 592, a member of a banking firm engaged in another business under a corporate name, owning all the stock himself, except four shares. He conducted the business and owned all the assets of the concern. The corporation was indebted to the bank for money lent. The bank became insolvent, and the corporation went into the hands of a receiver. Under the circumstances it was held, that as the owner of the corporation was a member of the bank, the latter was not entitled to share in the assets of the corporation until its other creditors had been paid. *A fortiori*, a sole stockholder cannot obtain a preference over other creditors: *Levins v. W. O. Peeples Grocery Co.*, (Tenn.) 38 S. W. Rep. 733.

5. Purchase of all the Stock of one Corporation by another.—The rules laid down above apply with equal force to the purchase of the whole stock of one corporation by another. As

long as the former retains its corporate organization the two do not become identical: *Pullman's Palace Car Co. v. Mo. Pac. Ry. Co.*, 115 U. S. 587; the purchaser is not liable for the debts or negligence of the other: *Atchison, T. & S. F. R. R. Co. v. Cochran*, 43 Kans. 225; cannot sue on a cause of action belonging to it: *Fitzgerald v. Mo. Pac. Ry. Co.*, 45 Fed. Rep. 812; and is not vested with the legal title to the property of the other: *Exchange Bk. of Macon v. Macon Construction Co.*, (Ga.) 25 S. E. Rep. 326. Accordingly, though one who lends money to a corporation which owns all of the capital stock of a railroad company may, under some circumstances, subject to the payment of the loan the property of the railroad company as equitable assets of the borrower, he cannot, in such a case, even in equity, have his claim paid out of money realized by a receiver from a sale of the property of that company, in preference to the lien of a valid mortgage executed by the railroad company to secure an issue of bonds; nor can he, by virtue of his rights as an alleged creditor of the railroad company, under a decree disposing of the assets of the latter alone, be allowed payment of the loan out of earnings of the railroad company which came into the hands of the receiver while it was being operated by him; even though the receiver may have previously used portions of such earnings in paying interest to the bondholders secured by the mortgage, and in making betterments and improvements upon the railroad property, which largely increased the value of the bondholders' security: *Exchange Bank of Macon v. Macon Construction Co.*, (Ga.) 25 S. E. Rep. 326. But a railroad company which owns all the stock of another may lease it to another line, and have the rent paid directly to it: *Union Pac. Ry. Co. v. Chicago, R. I. & P. Ry. Co.*, 51 Fed. Rep. 309, affirming 47 Fed. Rep. 15; and if a corporation which owns all the stock of another procures by a vote of that stock the issue of bonds of that corporation for its benefit, secured by a trust deed of the property of the corporation, thereby impairing the value of the stock held by it, it cannot, for its own acts, avoid the bonds in the hands of purchasers: *McCaleb v. Goodwin*, (Ala.) 21 So. Rep. 967.

Divorce—Alimony—Enforcement of Decree—Income of Trust Estate.

WETMORE v. WETMORE ET AL.

(Court of Appeals of New York. May 26, 1896.)

(149 N. Y. 520 ; 44 N. E. Rep. 169. Modifying 79 Hun, 268 ; 29 N. Y. Suppl. 440.)

The effect of a judgment in an action for divorce, awarding alimony to the wife, directed to be paid by the husband, is to make her a creditor of the husband within the intention of the statute of uses and trusts, (1 R. S. 729, § 57,) and after having exhausted the remedy given her by the Code to obtain payment of alimony, she is entitled, through an action in equity, to subject the surplus income, over what is required for the husband's support, of a testamentary trust created for the husband's benefit without any valid direction for the accumulation of income, to payment of her alimony both past due and to accrue.

When a will bequeaths property in trust and directs that the income be applied by the trustee, from time to time as it shall accrue, to the use of the testator's son for life, without any direction for accumulation, and that the son shall have no power to anticipate or dispose of any of the income until fully accrued, and declares that the will is made with reference to the laws of the state of New York relating to trusts, the will is not subverted nor the trust annulled by a judgment compelling the trustee to apply the surplus income of the trust which should thereafter accrue, as well as that then accumulated, over what is required for the son's support, to payment of alimony awarded to the son's wife by a judgment of divorce.

When a will creating a trust for the benefit of a married man makes no mention of his wife, a just rule and a safe basis for adjustment, where the question of support arises between him and his wife, are furnished by treating them as one, and both entitled to support out of the income of the estate, so far as creditors are concerned.

While it is the duty of the court, in an action in equity subjecting the income of a trust created for the benefit of the husband to payment of alimony to his wife, to protect the husband's right to support, the judgment in such action need make no provision for his present support, where it appears that he has an income sufficient therefor derived from property possessed by him in his own right ; but the judgment should

permit him to apply at any time, in case of a change in his circumstances, for leave to share in the income of the trust.

Appeal from judgment of the General Term of the Supreme Court in the First Judicial Department, entered upon an order made June 15, 1894, which affirmed a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

The nature of the action and the facts, so far as material, are stated in the opinion.

S. P. Nash, for appellant, Sarah T. Wetmore.—The judgment appealed from subverts the will of Samuel Wetmore, in effect abrogates the perfectly legal provisions made by him for the support of his son William B., and displaces the trustee, Sarah Taylor Wetmore, while at the same time adjudging that there is no ground for her removal: *Douglas v. Cruger*, 80 N. Y. 15; *Cuthbert v. Chauvet*, 136 N. Y. 326; *Lent v. Howard*, 89 N. Y. 169; *Leggett v. Perkins*, 2 N. Y. 297; *Wetmore v. Truslow*, 51 N. Y. 338; *Hood v. Cathcart*, [1894] 2 Q. B. 559; *Pike v. Fitzgibbon*, 17 Ch. D. 454; *Loftus v. Heriot*, [1895] 2 Q. B. 212. The plaintiff sought to obtain the relief prayed for by invoking the provision of the statute that the surplus of such a fund beyond the sum that may be necessary for the education and support of the person for whose benefit the trust is created shall be liable in equity to the claims of the creditors of such person in the same manner as other personal property which cannot be reached by an execution at law. The language of this section does not subject the trust fund to the plaintiff's claims. She is not a creditor: *Romaine v. Chauncey*, 129 N. Y. 566. The income cannot be reached for the purpose of satisfying a judgment for alimony upon the ground that the beneficiary's wife and children are included in the personal use to which the income of the trust fund is to be applied: 2 Bishop on Mar. & Div. § 352; *Genet v. Beekman*, 45 Barb. (N. Y.)

382; *Miller v. Miller*, 7 Hun, (N. Y.) 208; *Stones v. Cooke*, 7 Sim. 22; 2 Story's Eq. Juris. § 1476; *Adams v. Adams*, 100 Mass. 365; *Codd v. Codd*, 2 Johns. Ch. (N. Y.) 141; Code Civ. Proc. §§ 548, 1913. The error of the judgment appealed from is that it entirely disregards statutes which permit just such a trust as that which the decision subverts: 1 R. S. 729, 730, §§ 60, 63. The jurisdiction of the courts in matrimonial actions is purely statutory. The rights of husband or wife to a divorce depend upon the statutes, and are as various as the opinions of the legislators who enact them, and so the remedies of the aggrieved party are those only which the statutes prescribe: Code Civ. Proc. §§ 550, 551, 1742-1774; *Dudley v. Mayhew*, 3 N. Y. 9; *In re N. Y., L. E. & W. R. R. Co.*, 110 N. Y. 374, 379; *Miller v. Miller*, 7 Hun, (N. Y.) 208; *Erkenbrach v. Erkenbrach*, 96 N. Y. 456; *Romaine v. Chauncey*, 129 N. Y. 566; *C. T. Co. v. Wetmore*, 67 Hun, (N. Y.) 9. If in this action, considered as a creditor's action, any portion of the trust fund could be reached, no more could be reached than had accumulated at the time the action was brought: *Tolles v. Wood*, 16 Abb. N. C. (N. Y.) 1; 99 N. Y. 616; *Stewart v. McMartin*, 5 Barb. (N. Y.) 438; *Noyes v. Blakeman*, 2 Seld. (N. Y.) 567; *In re Hoyt*, 5 Dem. (N. Y.) 432.

Gerrard Irvine Whitehead, for appellant, William B. Wetmore.—If it should be held that the judgment in the action at bar is a debt due from the defendant to his former wife, then he is entitled to the protection the statute affords him as to his maintenance and support out of the income of the trust fund: Code Civ. Proc. §§ 1871-1879; *Tolles v. Wood*, 99 N. Y. 616; *Miller v. Miller*, 1 Abb. N. C. (N. Y.) 30; *Barber v. Barber*, 21 How. (U. S.) 582. If, however, it should be held that the claim of the former wife is not a debt, but even under the judgment for money which was docketed as the foundation of this action, retains its form of alimony, it can only be collected in the manner pointed

out by the Code: *Hadden v. Spader*, 20 Johns. (N. Y.) 554. The plaintiff here can only maintain this action as a judgment creditor, and it is as such she pursues: *Miller v. Miller*, 7 Hun, (N. Y.) 208. The defendant William B. Wetmore, as a beneficiary of the trust created by the will of his father, Samuel Wetmore, is entitled to his personal maintenance and support, in his accustomed manner of living, out of the income of the fund: 3 R. S. (7th ed.) 2180; *Sillick v. Mason*, 2 Barb. Ch. (N. Y.) 79; *Scott v. Nevius*, 6 Duer, (N. Y.) 672; *Hallett v. Thompson*, 5 Paige, Ch. (N. Y.) 583; *Stow v. Chapin*, 21 N. Y. S. R. 38. It is the duty of the plaintiff to show what would be a proper allowance to the beneficiary for his support, and that there would be a surplus of income over and above this sum: *Kilroy v. Wood*, 42 Hun, (N. Y.) 636. The court exceeded its powers in decreeing that the future income received from the trust fund should be applied to the payment of future alimony as it accrues: *Parker v. Harrison*, 10 J. & S. (N. Y.) 150; *Wetmore v. Truslow*, 51 N. Y. 338.

Flamen B. Candler, for respondent.—The action was properly brought by the plaintiff, even though she be considered simply a judgment creditor for the \$4,500 mentioned in the complaint, and by the commencement of the action she acquired a lien upon the net surplus income of the trust estate due and to become due to the extent necessary to secure her claims, and by reason of such lien and of the restrictions in the will creating the trust estate, the defendant, William B. Wetmore, has no power to dispose of the income so as to defeat the plaintiff's lien and claims: *C. T. Co. v. Wetmore*, 67 Hun, (N. Y.) 9; Code Civ. Proc. §§ 1871, 1879; *Williams v. Thorn*, 70 N. Y. 270; 81 N. Y. 381; *Tolles v. Wood*, 99 N. Y. 616; 16 Abb. N. C. (N. Y.) 1; *Graff v. Bonnett*, 31 N. Y. 9; *Craig v. Hone*, 2 Edw. Ch. (N. Y.) 376; *Sillick v. Mason*, 2 Barb. Ch. (N. Y.) 79; *Foster v. Townshend*, 68

N. Y. 203 ; *Lansing v. Lansing*, 4 Lans. (N. Y.) 377 ; *Miller v. Miller*, 7 Hun, (N. Y.) 208 ; Code Civ. Proc. § 1240 ; *Ryckman v. Ryckman*, 34 Hun, (N. Y.) 235 ; 2 Lewin on Trusts, 875. The action was properly brought by the plaintiff, and can be maintained by her to reach the surplus income from the trust estate created for the benefit of the defendant, William B. Wetmore, so far as the same may be necessary for the payment to her of the \$10,500 due to her as proved upon the trial, and for the payment to her annually of the \$6,000 awarded to her by the judgment of divorce mentioned in the complaint: *Thompson v. Thompson*, 52 Hun, (N. Y.) 456 ; *Miller v. Miller*, 1 Abb. N. C. (N. Y.) 30 ; *C. T. Co. v. Wetmore*, 67 Hun, (N. Y.) 9. Independently of the provisions of the statute and of the question as to whether or not an execution has been issued, the court under its general powers, as a court of equity, can grant full relief under the particular circumstances of this case : *Nat. T. Bank v. Wetmore*, 124 N. Y. 241 ; *Harvey v. McDonnell*, 113 N. Y. 526 ; *National Bank v. Levy*, 127 N. Y. 549, 555. The granting of costs to the plaintiff and the inserting in the judgment the usual provisions in equity suits giving her leave to apply for such decretal orders at the foot of the decree as may be necessary for its enforcement, were discretionary with the trial court, and furnish no ground for a reversal : Code Civ. Proc. § 3230 ; 1 Barb. Ch. Pr. (1st ed.) 332, 333 ; 2 Barb. Ch. Pr. (1st ed.) 453, 454. The exception that the judgment of divorce is no evidence as to the amount of the trust fund needed for the support of the defendant, William B. Wetmore, is frivolous : *Ferguson v. Hubbell*, 97 N. Y. 507 ; *Genet v. Beekman*, 45 Barb. (N. Y.) 382 ; *Sillick v. Mason*, 2 Barb. Ch. (N. Y.) 79 ; *Moulton v. de ma Carty*, 6 Robt. (N. Y.) 533 ; *Paige v. Hazard*, 5 Hill, (N. Y.) 603 ; *Morehouse v. Mathews*, 2 N. Y. 514 ; *McGregor v. Brown*, 10 N. Y. 114 ; *N. T. Bank v. Wetmore*, 124 N. Y. 241 ; *Wetmore v. Wetmore*, 8 Misc. Rep. (N. Y.) 51 ; 79 Hun, (N. Y.) 268.

HAIGHT, J.—This action was brought to obtain a judgment applying the accumulated income of a trust estate created for the benefit of the defendant, William B. Wetmore, in satisfaction of the plaintiff's judgment for alimony due, and which may accrue to her in the future. The plaintiff was his wife, and on the 1st day of April, 1892, obtained a judgment of absolute divorce in the supreme court, which required him to pay her, as alimony, the sum of \$3,000 per year, and the further sum of \$1,000 per year for each of her three infant children until they should respectively become of age. To secure such payments he was required to give a bond in the penal sum of \$50,000, with two sufficient sureties. At the time of entering the judgment he resided in the city of New York, but shortly thereafter removed to the state of New Jersey, and ever since has remained absent from this state, and has not given the bond required by the judgment, nor paid any of the alimony. After the sum of \$4,500 of the alimony had become due and payable, a judgment was entered against him in favor of the plaintiff for that amount, on which an execution was issued and returned unsatisfied. Proceedings were then instituted to sequester his property found within the state, but none was discovered, and all attempts to collect the alimony due, either by action or proceedings, failed: *Continental Trust Co. v. Wetmore*, 67 Hun, (N. Y.) 9, 21 N. Y. Suppl. 746.

After exhausting the remedies given the plaintiff by law, this action was commenced, and the chief question brought up for review is as to the jurisdiction of the court to award the judgment appealed from. It is claimed that it subverts, and, in effect, abrogates, the provisions of the will of Samuel Wetmore, made for the support of his son, the defendant, William B. Wetmore. Samuel Wetmore was a resident of the city of New York, and on the 6th day of March, 1885, died, leaving a last will and testament, in which, among other things, he gave and bequeathed to his executors

\$100,000 upon trust, to keep the same invested, and collect the profits therefrom, and to apply the net income from time to time, as it should accrue, to the use of his son as long as he should live. By the eighth clause of his will he directed that "no person for whose benefit any trust is hereby created shall have power to anticipate or to dispose of any income directed to be paid or applied to the use of such person until the same shall have fully accrued and become payable to such heir, and the trustees of said respective trusts are empowered and requested to disregard and defeat every assignment or other act in contravention of this clause in my will." By the ninth clause he provided: "I declare that this, my will, and every part thereof, is made with reference to the present existing laws and statutes of the state of New York relating to trusts and trust estates, and the disposition of personal estates by will or legal distribution, and without regard to the laws and regulations of any state or country where I may happen to be at the time of my decease, or where any portion of my estate may be situated."

Section 57 of the Revised Statutes, with reference to uses and trusts, provides that, "where a trust is created to receive the rents and profits of lands, and no valid direction for accumulation is given, the surplus of such rents and profits beyond the sum that may be necessary for the education and support of the person for whose benefit the trust is created, shall be liable in equity to the claims of the creditors of such person in the same manner as other personal property which cannot be reached by an execution at law." It has been held that this provision of the statute is equally applicable to a trust created to receive and pay over the income of personal property, and that an action may be maintained by a judgment creditor, after the return of an execution unsatisfied, to reach the surplus income, beyond what is necessary for the suitable support and maintenance of the *cestui que trust* and those dependent upon him: *Williams v. Thorn*, 70 N. Y. 270; *Tolles v. Wood*, 99 N. Y. 616, 1 N. E. Rep.

251 ; *Graff v. Bonnett*, 31 N. Y. 9 ; *Sillick v. Mason*, 2 Barb. Ch. (N. Y.) 79.

Is the plaintiff such a creditor? As we have seen, a judgment has been entered in her favor for the alimony that had become due and payable. She is, therefore, as to that amount, a judgment creditor, and as such, entitled to avail herself of all the remedies given by the statute. It is claimed that this judgment was irregularly entered. Its regularity is supported by the General Terms: *Miller v. Miller*, 7 Hun, (N. Y.) 208 ; *Lansing v. Lansing*, 4 Lans. (N. Y.) 377 ; Code Civ. Proc. § 1240. But this question we do not consider now before us for determination. If the judgment was entered irregularly, or without authority, the judgment debtor should avail himself of appropriate remedies to rid himself therefrom, for judgments ordinarily will not be annulled in collateral actions, where they are incidentally brought in question. Inasmuch as the judgment entered for alimony past due does not cover all of the alimony that has accrued and is provided for in the judgment entered in this action, it becomes necessary to determine the effect of the judgment in the divorce action awarding alimony to the plaintiff.

In *Romaine v. Chauncey*, 129 N. Y. 566, 29 N. E. Rep. 326, alimony had been awarded to an innocent wife, as incidental to a decree of divorce in her favor, for her support and maintenance. It was held that the awarding of alimony was not the enforcement of a debt due to the wife from her husband, but was founded upon the marital obligation of support, from which he was not relieved by the decree. Its allowance is measured by the court, and is made specific, and while in one sense it is the property of the wife, it is a specific sum, provided for a specific purpose, created by equity, having the protection of equity, and consequently will not be applied in the payment of debts contracted by her prior to the decree. It will thus be seen that the awarding of alimony is not on account of any debt due and owing from the hus-

band to the wife, but that it is based upon a duty devolving upon the husband to support her, and that in awarding judgment against him the court determines the amount necessary for such support, and requires the amount so fixed to be paid to her. His duty is thus determined, and from that time on he is, in effect, a debtor, owing his wife the amount adjudged and determined by the decree. While such amount is in effect the property of the wife, yet, it being created and protected by equity, cannot be reached by prior existing creditors.

The will, as we have seen, contains no direction for the accumulation of surplus. Such surplus, over and above that which is necessary for the support of the defendant, William, is therefore, under the statute, made liable in equity to the claims of his creditors. Equity is here given jurisdiction to apply such surplus, and it appears to us that the plaintiff is a creditor within the spirit and intention of the statute.

The constitution gives to the supreme court general jurisdiction in law and equity. As a court of equity it is invested with the power and jurisdiction exercised by the ancient court of chancery in England, with the exceptions, additions and limitations created and imposed by the constitution and laws of this state: 2 Rev. St., p. 173, § 36. The Code contains statutory provisions with reference to the collection and enforcement of judgments awarding alimony. It, however, contains no provision attempting to limit or curtail the powers of the court of equity. It is the province of that court to interpose when the law fails to afford an adequate remedy: *Bank v. Wetmore*, 124 N. Y. 241, 26 N. E. Rep. 548.

As we have seen, the plaintiff has availed herself of the remedies given by statute without success. She then brought this action, appealing to the equity powers of the court to enforce her rights. When she became the wife of the defendant, William, he undertook to support and maintain her

during life. That duty still devolves upon him, notwithstanding the decree of divorce. Being the guilty party, his duty is continued, and is measured and fixed by the decree: *Romaine v. Chauncey*, *supra*. At common law the husband and wife were recognized as one. The married woman's acts have to some extent changed the common-law rule, but as to the question we have here under consideration, their common-law unity still exists: *Bertles v. Nunan*, 92 N. Y. 152.

The will creating the trust for the benefit of William makes no mention of his wife, and yet, owing to their unity of person and his duty to support her, equity will not permit the interposition of creditors, until there is a surplus over and above that which is necessary for the support of himself, his wife and infant children: *Williams v. Thorn*, 70 N. Y. 270; *Tolles v. Wood*, 99 N. Y. 616, 1 N. E. Rep. 251; *Sillick v. Mason*, 2 Barb. Ch. (N. Y.) 79. Equity will not feed the husband and starve the wife. Neither will it favor the wife to the detriment of the husband. Treating them as one, and both entitled to support out of the income of the estate, as far as creditors are concerned, furnishes a just rule and a safe basis for adjustment, where the question of support arises between themselves. In *Thompson v. Thompson*, 52 Hun, (N. Y.) 456, 5 N. Y. Suppl. 604, a trust had been created by will in favor of the defendant similar to the one in question. The plaintiff was the wife of the defendant and had obtained a divorce, with an allowance of \$800 per year for her support. That action, like this, was brought to compel the trustee to pay her alimony out of the income of the trust estate payable to her husband. Judgment was awarded in her favor, and the same was affirmed in the general term.

In *Clinton v. Clinton*, 1 L. R. Prob. & Div. 215, the court had made an order on the respondent for payment of permanent alimony at the rate of £110 per annum, so long as he was in receipt of a rent charge of £400 per annum, his only source of income. The respondent had become a bank-

rupt, and had failed to comply with the order of the court. It was held that sequestration, in general terms, should issue against his property. In *Watkyns v. Watkyns*, 2 Atk. 96, a bill was brought against the husband for maintenance. It appeared that the defendant had possessed himself of the fortune of his wife and then departed the kingdom, without leaving any provision for her maintenance. The decree adjudged that the interest arising from the trust money should be paid to her, until the husband returned and maintained her. See, also, *Head v. Head*, 3 Atk. 295; *Colemore v. Colemore*, referred to therein, and *Miller v. Miller*, 1 Abb. N. C. (N. Y.) 30.

The judgment requires the trustees to pay over not only the surplus accumulated, but that which shall hereafter accrue, in satisfaction of the plaintiff's allowance for alimony. We do not think the court exceeded its powers in this respect, or that the judgment operates to annul the trust. To hold that a separate action must be brought as each annual or semi-annual payment accrued would be burdensome and unnecessary. The question is analogous to that disposed of in the case of *Williams v. Thorn*, 70 N. Y. 270, in which it was held that the remedy of the creditor is not confined to the surplus which has accrued and accumulated in the hands of the trustee, but that provision may be made in the judgment, determining what will be a reasonable allowance for the *cestui que trust*, and directing the application towards the payment of the judgment out of any future surplus.

The judgment makes no provision for the support of the defendant, William. The trust was created for his benefit. He is entitled to his support, as well as the plaintiff, and it is the duty of the court to properly protect him in this respect. But it is found as a fact by the trial court that at the time of the entering of the judgment in the divorce action he was possessed of an estate in his own right of the value of about \$200,000, from which, with the trust estate, he had

an income of about \$15,000 per year; that, after the decree, he removed with his estate from the jurisdiction of the court, and has continued ever since to refuse obedience to its mandates. The inference to be drawn from the facts is that his income is sufficient to support him. If this is not so, it was his duty, upon the trial, to have presented evidence showing his necessities.

The case of *Holden v. Strong*, 116 N. Y. 471, 22 N. E. Rep. 960, has no application to the question here presented. In determining the defendant's necessities we think the rule is well stated in *Moulton v. de ma Carty*, 6 Robt. (N. Y.) 533: "It is proper to consider his station in life, and the manner in which he has been reared and educated, his habits, and the means he may have to aid in his support." It is suggested that his circumstances may change, and that in such case the income from the trust estate, or some portion thereof, should be devoted to his maintenance. This is true, and in this respect we think the judgment should be modified. It permits the plaintiff to apply, from time to time, for such orders at the foot of the judgment as may be necessary for its enforcement; and we think that, in view of the fact that the judgment appropriates the future income from the trust estate for the support of the defendant William's wife and children, that he also should have leave at any time to apply for leave to share in such income, or to modify the judgment in that regard.

The judgment should be modified accordingly, and, as so modified, affirmed, with costs. All concur. Judgment accordingly.

ENFORCEMENT OF DECREE FOR ALIMONY.

1. Remedies at Law and in Equity.—The manner of enforcing a decree for the payment of alimony is usually prescribed by statute; but independently of any such provisions, the court which pronounced the decree has inherent power to enforce it by any of the usual methods:

(1) As a judgment at law, by execution: *Robinson v. Robinson*, 79 Cal. 511; *Van Cleave v. Bucher*, 79 Cal. 600; *People v. Dist. Court*, 21 Colo. 251; *Tyler v. Tyler*, (Ky.) 34 S. W. Rep. 898; *Allen v. Allen*, 100 Mass. 373; *Wooley v. Wooley*, *Wright*, (Ohio,) 245; *Conrad v. Everich*, 50 Ohio St. 476; *contra*, *Goss v. Goss*, 29 Ga. 109; in the county, or on a transcript filed in another county: *Hall v. Harrington*, 7 Colo. App. 474; *infra*, p. 507; on which the husband may be arrested: *Foster v. Foster*, 130 Mass. 189; and on which he cannot claim exemption: *Menzie v. Anderson*, 65 Ind. 239; (though execution can only issue on a judgment or decree; not on a mere agreement to pay alimony, pending a suit, in the absence of a decree: *Brigham v. Brigham*, 147 Mass. 159; and where imprisonment for debt has been abolished, it must be by *feri facias*, not *capias ad satisfaciendum*: *Elmer v. Elmer*, 150 Pa. 205;) or by *scire facias*: *Morton v. Morton*, 4 Cush. (Mass.) 518; *Bouslough v. Bouslough*, 68 Pa. 495.

(2) As a decree in equity: *Blake v. People*, 80 Ill. 11; *Burrows v. Purple*, 107 Mass. 428; by supplementary proceedings: *Barker v. Dayton*, 28 Wis. 367; by sequestration: *Blenkinsopp v. Blenkinsopp*, 1 De G., M. & G. 495, affirming 12 Beav. 568; *Clinton v. Clinton*, 1 L. R. P. & D. 215; *Willcock v. Terrell*, 3 Exch. D. 323; *Birch v. Birch*, 8 P. D. 163; *Sansom v. Sansom*, 4 P. D. 69; *Allen v. Allen*, 10 P. D. 187; *Blake v. People*, 80 Ill. 11; *Lockridge v. Lockridge*, 3 Dana, (Ky.) 28; *Guenther v. Jacobs*, 44 Wis. 354; by attachment: *Goss v. Goss*, 29 Ga. 109; *Daniels v. Lindley*, 44 Iowa, 567; *Waters v. Waters*, 49 Mo. 385; *Wallen v. Wallen*, 11 Pa. C. C. 41; even as against a minor, who sues by next friend: *West v. West*, 11 Pa. C. C. 254; though this remedy is resorted to, as a general rule, only when an execution cannot issue: *North v. North*, 39 Mich. 67; *e. g.*, in the case of an order for alimony *pendente lite*: *Groves's Ap-*

peal, 68 Pa. 143; and will not lie to collect arrears, in England: *De Lossy v. De Lossy*, 15 P. D. 115; or by appointing a receiver: *Sidney v. Sidney*, 17 L. T. N. S. 9; *Petaluma Sav. Bk. v. Superior Ct.*, 111 Cal. 488; *Bergen v. Bergen*, 22 Ill. 187; *Holmes v. Holmes*, 29 N. J. Eq. 9; *Carey v. Carey*, 2 Daly, (N. Y.) 424; *Questel v. Questel*, Wright, (Ohio,) 492; *Stillman v. Stillman*, 7 Baxt. (Tenn.) 169; *Barker v. Dayton*, 28 Wis. 367. A decree for alimony cannot be proved in bankruptcy, in England: *Prescott v. Prescott*, 20 L. T. N. S. 331; though arrears may: *Linton v. Linton*, 15 Q. B. D. 239; except such as have accrued since the receiving order: *In re Hawkins*, [1894] 1 Q. B. 25; but there would seem to be no reason why such claims should not be provable in insolvency proceedings in the United States.

2. Contempt.—On neglect or refusal of the husband to pay the alimony ordered, the decree therefor may be enforced by proceedings in contempt: *Ex parte Perkins*, 18 Cal. 60; *Ex parte Cottrell*, 59 Cal. 417; *Ex parte Hart*, 94 Cal. 254; *Lyon v. Lyon*, 21 Conn. 185; *Goss v. Goss*, 29 Ga. 109; *Wightman v. Wightman*, 45 Ill. 167; *Andrews v. Andrews*, 69 Ill. 609; *Blake v. People*, 80 Ill. 11; *Prescott v. Prescott*, 59 Me. 146; *Russell v. Russell*, 69 Me. 336; *Filer v. Filer*, 77 Mich. 469; *Pritchard v. Pritchard*, 4 Abb. N. C. (N. Y.) 298; *Strobridge v. Strobridge*, 21 Hun, (N. Y.) 288; *Park v. Park*, 80 N. Y. 156; *Holtham v. Holtham*, 6 Misc. Rep. (N. Y.) 266; *Zimmerman v. Zimmerman*, 113 N. C. 432; *Stewart v. Stewart*, 23 Wkly. Law Bull. (Ohio,) 38; *Effinger v. State*, 11 Ohio Cir. Ct. 389; *Myers v. Myers*, 3 Ohio N. P. 162; *Groves's Appeal*, 68 Pa. 143; *Tobin v. Tobin*, 12 Pa. C. C. 374; although the alimony was not prayed for in the complaint: *Hecht v. Hecht*, 14 Misc. Rep. (N. Y.) 597; whether it be payable in gross or in instalments; the remedy by contempt proceedings being preferable in the latter case: *Staples v. Staples*, 87 Wis. 592; *Hand v. Hand*, 25 Wkly. Law Bull. (Ohio,) 214; and the fact that the decree makes the alimony an express lien on certain real estate: *McSherry v. McSherry*, 49 Ill. App. 90; or that a statute provides a special remedy; *e. g.*, by execution: *People v. Dist. Court*, 21 Colo. 251; will not deprive the court of this power. But the petition

must be brought in the suit in which the divorce was granted: *Curtis v. Gordon*, 62 Vt. 340; *Andrew v. Andrew*, 62 Vt. 495. In instituting proceedings for contempt for refusal to pay alimony, it is not necessary to make a formal demand therefor, when it appears that the defendant had informed the complainant that he would not pay, and had refused to pay her attorney the fees ordered: *Potts v. Potts*, 68 Mich. 492. The contempt will be purged, however, by proof of inability to comply with the decree: *Schuele v. Schuele*, 57 Ill. App. 189; *Russell v. Russell*, 69 Me. 336; *Nixon v. Nixon*, 15 Mont. 6; or that the decree was void: *Hart v. Hart*, 1 Ohio N. P. 56; but the burden of proof of these facts rests on the husband: *Hurd v. Hurd*, 63 Minn. 443. When an order requiring the defendant to pay alimony and counsel fees cannot be served upon him personally, because he absents himself from the state, service upon his solicitor is sufficient to make him guilty of contempt, if he disobeys the order: *Fairchild v. Fairchild*, (N. J.) 13 Atl. Rep. 599. An order for the payment of alimony is not a debt within the statutes abolishing imprisonment for debt; and consequently these statutes do not take away the remedy by contempt for non-payment of alimony: *Ex parte Perkins*, 18 Cal. 60; *Carlton v. Carlton*, 44 Ga. 216; *Pain v. Pain*, 80 N. C. 322; *contra*, *Coughlin v. Ehlert*, 39 Mo. 285.

In New York, proceedings in contempt in case of non-payment of alimony differ from other contempt proceedings. They cannot be brought until after the other remedies fail: *Cockefair v. Cockefair*, 7 N. Y. Suppl. 170; *Whitney v. Whitney*, 58 N. Y. Super. Ct. 335; but do not require the same strictness of procedure: *In re Sims*, 57 Hun, (N. Y.) 433. Under the New York statutes, a person once committed for contempt in failing to pay alimony cannot be reimprisoned for failure to pay alimony accruing during the time of his imprisonment: *Winton v. Winton*, 117 N. Y. 623.

3. **Ne Exeat.**—In America, upon a petition or affidavit of the wife, alleging that the husband is about to leave the jurisdiction, the court may issue a writ of *ne exeat republica*, which will be discharged only upon his giving security for the payment of whatever alimony may be awarded against him: *Lyon v. Lyon*,

21 Conn. 185; *McGee v. McGee*, 8 Ga. 295; *Harper v. Rooker*, 52 Ill. 370; *Bayly v. Bayly*, 2 Md. Ch. 326; *Bylandt v. Bylandt*, 6 N. J. Eq. 28; *Yule v. Yule*, 10 N. J. Eq. 138; *Denton v. Denton*, 1 Johns. Ch. (N. Y.) 364; *Hammond v. Hammond*, Clarke Ch. (N. Y.) 151; *Kirby v. Kirby*, 1 Paige Ch. (N. Y.) 261; *Prather v. Prather*, 4 Desaus. Ch. (S. Car.) 33; *Devall v. Devall*, 4 Desaus. Ch. (S. Car.) 79; but by the English practice, this will be granted only after decree, and the husband will be required to give security only for whatever is actually due at the time of the application, with costs: *Pearne v. Lisle*, Ambl. 76; *Ex parte Whitmore*, 1 Dick. 143; *Shaftoe v. Shaftoe*, 7 Ves. 171; *Dawson v. Dawson*, 7 Ves. 173; *Oldham v. Oldham*, 7 Ves. 410; *Haffey v. Haffey*, 14 Ves. 261.

4. Security for Alimony.—In many states, by statute, the husband may be required to give security for alimony: *Reiffenstein v. Hooper*, 36 U. C. Q. B. 295; *Petaluma Sav. Bk. v. Superior Ct.*, 111 Cal. 488; *Galusha v. Galusha*, 108 N. Y. 114; and where the power of the court over the amount of alimony continues after decree, security need not be demanded at the time of granting the decree, but may be required at any time thereafter: *Wright v. Wright*, 74 Wis. 439. But unless it be expressly provided otherwise, security can be demanded only in the divorce suit, not in an ancillary proceeding to revise the allowance of alimony: *Blake v. Blake*, 70 Wis. 238.

5. Lien upon Property of Husband.—The alimony may be charged by the decree upon the husband's real estate, under the general equity powers of the court, without special statutory authority: *Gaston v. Gaston*, 114 Cal. 542; *O'Callaghan v. O'Callaghan*, 69 Ill. 552; *Russell v. Russell*, 4 Greene, (Iowa,) 26; *Blankenship v. Blankenship*, 19 Kans. 159; *Holmes v. Holmes*, 29 N. J. Eq. 9; *Olin v. Hungerford*, 10 Ohio St. 268; *Stillman v. Stillman*, 7 Baxt. (Tenn.) 169, 186; even upon an estate in remainder, if vested: *Min Young v. Min Young*, 47 Ohio St. 501; and this will not deprive the court of the power to enforce payment by attachment for contempt: *McSherry v. McSherry*, 49 Ill. App. 90. When periodical payments are made a lien on land, and the court orders them to be com-

mutated for a gross sum, it may make that a lien on the land likewise : *King v. Miller*, 10 Wash. 274. This lien may be adjudged to be superior to the lien of a chattel mortgage given to defraud the wife : *Gardenhire v. Gardenhire*, 2 Okl. 484 ; and to be a valid charge upon the husband's interest in a contract of purchase, as against an assignee of that contract with notice of the wife's claim, who took the assignment with intent to defraud her : *Glick v. Glick*, (Mich.) 68 N. W. Rep. 153 ; but the decree cannot be made to date back so as to cut out intervening judgment creditors : *Daniels v. Lindley*, 44 Iowa, 567. It cannot be made a lien upon personal property, moreover, without statutory authority : *Johnson v. Johnson*, 22 Colo. 20. Statutory provisions that all judgments and decrees for the payment of money shall be a lien upon real estate include decrees for alimony ; and a conveyance after decree will make the land liable to execution in the hands of the purchaser : *Frakes v. Brown*, 2 Blackf. (Ind.) 295 ; *Mahoney v. Mahoney*, 59 Minn. 347 ; *Conrad v. Everich*, 50 Ohio St. 476 ; *John v. John*, 12 Ohio Cir. Ct. 328. These statutes, however, do not authorize the making of alimony a lien on personal property : *Yelton v. Handley*, 28 Ill. App. 640 ; nor the sale of specific property to pay alimony : *Nygren v. Nygren*, 42 Neb. 408 ; and if the wife wishes the alimony to be made a specific lien, she must still pray for it in the petition : *Philbrick v. Andrews*, 8 Wash. 7.

6. Injunction to restrain Alienation of Property.—Upon a proper showing of facts, the court will issue an injunction, pending the suit for divorce, or in aid of the decree, after its rendition, to restrain the husband from alienating or charging his property, in fraud of the wife's claim for alimony : *Sidney v. Sidney*, 17 L. T. N. S. 9 ; *Newton v. Newton*, [1895] W. N. 152 ; *Norris v. Norris*, 27 Ala. 519 ; *Goodrich v. Goodrich*, 44 Ala. 670 ; *In re White*, 113 Cal. 282 ; *Johnson v. Johnson*, 59 Ga. 613 ; *Gray v. Gray*, 65 Ga. 193 ; *Bergen v. Bergen*, 22 Ill. 187 ; *Errissman v. Errissman*, 25 Ill. 136 ; *Draper v. Draper*, 68 Ill. 17 ; *Frakes v. Brown*, 2 Blackf. (Ind.) 295 ; *Wharton v. Wharton*, 57 Iowa, 696 ; *Fishli v. Fishli*, 2 Litt. (Ky.) 337 ; *Ricketts v. Ricketts*, 4 Gill, (Md.) 105 ; *Gechter v. Gechter*, 51 Md. 187 ; *Morrison v. Morrison*, 49 N. H. 69 ; *Hammond v. Hammond*,

Clarke Ch. (N. Y.) 151; Kirby v. Kirby, 1 Paige Ch. (N. Y.) 261; Laurie v. Laurie, 9 Paige Ch. (N. Y.) 234; Rose v. Rose, 11 Paige Ch. (N. Y.) 166; Carey v. Carey, 2 Daly, (N. Y.) 424; Gilmore v. Gilmore, 5 Jones Eq. (N. C.) 284; Wilson v. Wilson, Wright, (Ohio,) 128; Questel v. Questel, Wright, (Ohio,) 492; Tolerton v. Williard, 30 Ohio St. 579; Irwin v. Irwin, 2 Okl. 180; Uhl v. Irwin, 3 Okl. 388; Wilson v. Wilson, 1 Desaus. Ch. (S. Car.) 219; Boils v. Boils, 1 Coldw. (Tenn.) 284; Stillman v. Stillman, 7 Baxt. (Tenn.) 169; but in England this will not be done before an order for alimony has been made: Newton v. Newton, 11 P. D. 11; nor when the order is simply for alimony *pendente lite*: Carter v. Carter, [1895] W. N. 142 (5). Such an injunction, when granted, prevents encumbrances and assignments: Vanzant v. Vanzant, 23 Ill. 536; but it would seem that it will not prevent the mortgaging of the property for the purpose of raising money to pay off the award of alimony and the expenses of litigation: Froman v. Froman, 53 Mich. 581. At all events, the court, in its discretion, may grant permission to mortgage the property for this purpose: White v. White, 97 Cal. 604.

7. Award of Specific Property.—In many of the states there are statutory provisions empowering the court, in its discretion, (which will not be reversed except in case of palpable abuse,) to award to the wife specific property, both real and personal, instead of alimony proper, thus dividing the husband's property between himself and his wife: Lovett v. Lovett, 11 Ala. 763; Smith v. Smith, 45 Ala. 264; Kashaw v. Kashaw, 3 Cal. 312; Boyd v. Boyd, (Cal.) 31 Pac. Rep. 1108; Rose v. Rose, 112 Cal. 341; Jackson v. Stewart, 20 Ga. 120; Bergen v. Bergen, 22 Ill. 187; Foote v. Foote, 22 Ill. 425; Plaster v. Plaster, 47 Ill. 290; Ross v. Ross, 78 Ill. 402; Russell v. Russell, 1 Carter, (Ind.) 510; Fischli v. Fischli, 1 Blackf. (Ind.) 360; Jolly v. Jolly, 1 Iowa, 9; Inskeep v. Inskeep, 5 Iowa, 204; Fishli v. Fishli, 2 Litt. (Ky.) 337; Thornberry v. Thornberry, 4 Litt. (Ky.) 251; Berthelemy v. Johnson, 3 B. Mon. (Ky.) 90; Wilmore v. Wilmore, 15 B. Mon. (Ky.) 49; Faulkner v. Faulkner, (Ky.) 15 S. W. Rep. 523; Sheafe v. Sheafe, 4 Foster, (N. H.) 564; Whittier v. Whittier, 11 Foster, (N. H.) 452; Chunn v. Chunn, Meigs, (Tenn.) 131; Richardson v. Wilson, 8 Yerg.

(Tenn.) 67; *Payne v. Payne*, 4 Humph. (Tenn.) 500; *Robinson v. Robinson*, 7 Humph. (Tenn.) 440; *Boggers v. Boggers*, 6 Baxt. (Tenn.) 299; *Chenault v. Chenault*, 5 Sneed, (Tenn.) 248; *Wright v. Wright*, 7 Tex. 526; *Young v. Young*, (Tex.) 23 S. W. Rep. 83; *Ferry v. Ferry*, 9 Wash. 239; *Kempster v. Evans*, 81 Wis. 247; *Harran v. Harran*, 85 Wis. 299. But these statutes do not authorize the granting of specific property to the children, when the suit is for divorce and the custody of the children: *Rodgers v. Rodgers*, 56 Kans. 483. Crops sown on the land, pending suit, pass with it to the wife: *Herron v. Herron*, 47 Ohio St. 544; but dower refused by statute to a wife who procures a divorce from her husband, cannot be assigned and set off to her as alimony in a divorce suit. It must appear clearly that it is alimony: *Holmes v. Holmes*, 54 Minn. 352. The award may be of any property of the husband, real or personal, and whether held by legal or equitable title; and also of community property: *Strozynski v. Strozynski*, 97 Cal. 189; but not of property held by husband and wife by the entireties: *Alexander v. Alexander*, 140 Ind. 560. In a proper case it may consist of the whole of the husband's estate; *e. g.*, when she has been granted a divorce for his cruelty: *Wuest v. Wuest*, 17 Nev. 217; so, all of the community property may be given to her: *Strozynski v. Strozynski*, 97 Cal. 189. Without statutory authority, the court has no power to award specific property as alimony: *Calame v. Calame*, 25 N. J. Eq. 548; *Doe v. Doe*, 52 Hun, (N. Y.) 405; though if the amount awarded be small, so that no harm is done, the award will not be set aside on that ground alone: *Brick v. Brick*, 65 Mich. 230. The wife takes only a conditional estate for life in the property thus awarded her, the fee remaining in the husband; and on her death or reconciliation it will revert to him: *Quisenberry v. Quisenberry*, 1 Duv. (Ky.) 197; *Taylor v. Taylor*, 93 N. C. 418; unless it be expressly provided that the award shall vest the fee in her: *Powell v. Campbell*, 20 Nev. 232; *Donovan v. Donovan*, 20 Wis. 586; *Bacon v. Bacon*, 43 Wis. 197; *Varney v. Varney*, 58 Wis. 19; but even when allowable, it has been held that the court ought not to grant part of the husband's lands to the wife in fee, if she brought him nothing, and did not contribute to the acquisition of the property: *Von Glahn v. Von Glahn*, 46 Ill.

134; *Keating v. Keating*, 48 Ill. 241; *Dinet v. Eigenmann*, 80 Ill. 274; *Robbins v. Robbins*, 101 Ill. 416; *Wilson v. Wilson*, 102 Ill. 297. Further, the division of the property being within the discretion of the court, it may, even when awarding the fee to the wife, subject the land to an encumbrance in favor of the husband: *Gallagher v. Gallagher*, 89 Wis. 461. In jurisdictions where the division of property is not allowed, an agreement between the husband and wife as to dividing it on separation will be enforced after divorce: *Calame v. Calame*, 25 N. J. Eq. 548; but in those where division is allowed, such an agreement may be followed or disregarded, in the discretion of the court: *Loveren v. Loveren*, 106 Cal. 509; *Faris v. Goins*, (Ky.) 13 S. W. Rep. 2. Where the amount of alimony is subject to the continuing jurisdiction of the court, an order for the final division of the property need not be made in the first decree, but may be made at any time thereafter, on motion: *Blake v. Blake*, 75 Wis. 339.

8. Collection of Arrears of Alimony.—The enforcement of arrears of alimony is not an absolute right, but rests, especially after the death of the husband, in the sound discretion of the court—that discretion being practically the same which it exercises in increasing or reducing the original award: *Guenther v. Jacobs*, 44 Wis. 354. But the rule of the English courts, which limited the recovery of arrears of alimony given by decree of an ecclesiastical court to one year next preceding, does not obtain in America, and the court may grant judgment for the whole amount in arrear: *Brisbane v. Dobson*, 50 Mo. App. 170; and the claim may be enforced by suit in a foreign state: *Brisbane v. Dobson*, 50 Mo. App. 170; *Wood v. Wood*, 7 Misc. Rep. (N. Y.) 579; *Kunze v. Kunze*, (Wis.) 68 N. W. Rep. 391. A claim for arrears may be enforced against a deceased husband's estate, like any other claim: *Francis v. Francis*, 31 Gratt. (Va.) 283; *Guenther's Appeal*, 40 Wis. 115. In case of the wife's death her executor or administrator can only collect arrears of alimony when they are needed to pay creditors: *Stones v. Cooke*, 8 Sim. 821, *n.*, reversing 7 Sim. 22; *Clark v. Clark*, 6 W. & S. (Pa.) 85; *Bouslough v. Bouslough*, 68 Pa. 495; unless it is expressly reserved by the decree: *Burr v. Burr*, 7 Hill,

(N. Y.) 207; or is regulated by statute: *Miller v. Clark*, 23 Ind. 370; or was awarded as a gross sum: *Dinet v. Eigenmann*, 80 Ill. 274; *Miller v. Clark*, 23 Ind. 370. When arrears are recoverable they may be collected in America by any of the usual methods; but in England they cannot be collected by attachment: *De Lossy v. De Lossy*, 15 P. D. 115; though they may be proved in bankruptcy: *Linton v. Linton*, 15 Q. B. D. 239; (but see *Ex parte Rice*, 10 L. T. N. S. 103;) unless they have accrued since the receiving order: *In re Hawkins*, [1894] 1 Q. B. 25.

9. Enforcement of Alimony after Death of Parties.—Alimony cannot, as a general rule, be enforced after the death of either party: *Lennahan v. O'Keefe*, 107 Ill. 620; *Gaines v. Gaines*, 9 B. Mon. (Ky.) 295; *McCurley v. Stockbridge*, 62 Md. 422; *Dewees v. Dewees*, 55 Miss. 315; *Rogers v. Vines*, 6 Ired. (N. C.) 293; *Taylor v. Taylor*, 93 N. C. 418; *Nary v. Braley*, 41 Vt. 180; *Francis v. Francis*, 31 Gratt. (Va.) 283; and it is not within the exception of a statute which provides that no execution shall issue after death on a judgment obtained against the decedent in his lifetime, except a judgment for the recovery of real or personal property, or to enforce a lien thereon: *Weaver v. Pickard*, 7 Utah, 296. But if it is provided by statute that alimony shall continue after death: *Smythe v. Banks*, 73 Ga. 303; or if the decree is for a fixed sum, or if there is an agreement to that effect, either express or implied: *Storey v. Storey*, 125 Ill. 608; it will then be recoverable. In the latter case, if the alimony is payable in instalments, its amount will not be reduced merely because of the husband's early death: *Meissner v. Bergman*, 11 Ohio Cir. Ct. 539. When, however, the husband leaves the wife a sum equivalent to that fixed as alimony during life, she takes it in lieu of the latter, and her claim for alimony is extinguished thereby: *Maxwell v. Sawyer*, 90 Wis. 352. Similarly, alimony cannot be enforced after reconciliation: *Lockridge v. Lockridge*, 3 Dana, (Ky.) 28; *Wallingsford v. Wallingsford*, 6 H. & J. (Md.) 485; *Lockwood v. Krum*, 34 Ohio St. 1; *Tiffin v. Tiffin*, 2 Binn. (Pa.) 202.

10. Enforcement of Alimony in other Courts.—The court which rendered the decree is properly the one to enforce it,

when the parties are within its jurisdiction : *De Blaquiére v. De Blaquiére*, 3 Hagg. Eccl. 322; *Fischli v. Fischli*, 1 Blackf. (Ind.) 360; *Allen v. Allen*, 100 Mass. 373; *Van Buskirk v. Mulock*, 18 N. J. L. 184; *Barber v. Barber*, 2 Pinney, (Wis.) 297; *Campbell v. Campbell*, 37 Wis. 206; *Bacon v. Bacon*, 43 Wis. 197; *Guenther v. Jacobs*, 44 Wis. 354; but the federal courts will enforce it, if the parties reside in different states : *Barber v. Barber*, 21 How. 582; and though at common law an action of debt would not lie on a decree for the payment of alimony : *Van Buskirk v. Mulock*, 18 N. J. L. 184; under the statutes of most of the United States such a decree may be enforced by action at law in another court of the same state : *Traylor v. Richardson*, 2 Ind. App. 452; *Allen v. Allen*, 100 Mass. 373; or in the courts of another state : *Brisbane v. Dobson*, 50 Mo. App. 170; *Kunze v. Kunze*, (Wis.) 68 N. W. Rep. 391; as any other judgment; though in such an action in a foreign state no relief is obtainable other than the recovery of past due alimony : *Wood v. Wood*, 7 Misc. Rep. (N. Y.) 579. But a bond to secure the payment of alimony should be sued on in the court which required it, and not in another court, without leave of the former : *Guenther v. Jacobs*, 44 Wis. 354.

11. Out of what Property Alimony will be Enforced.—Alimony may be enforced out of any property belonging to the husband, on which no one has a prior claim. It may be enforced out of property belonging to him alone, or to him and his wife jointly, no matter in whose control the property is: *Lamy v. Catron*, (N. Mex.) 23 Pac. Rep. 773; out of lands in another county, if they are brought to the notice of the court by proper averments in the petition : *Wesner v. O'Brien*, 56 Kans. 724; though it cannot order them to be sold, at least in Ohio: *Wilmot v. Cole*, 23 Wkly. Law. Bull. (Ohio,) 339; out of a salary payable to a bankrupt, which is not under the control of his trustee : *Shine v. Shine*, [1893] P. 289; out of an equitable estate : *Watkins v. Watkins*, 2 Atk. 96; *Thompson v. Thompson*, 52 Hun, (N. Y.) 456; and it would seem that in Pennsylvania, where a spendthrift trust is liable to the wife's claim for maintenance on her desertion by her husband : *Decker v. Directors of the Poor*, 120 Pa. 272; Board of

Charities v. Kennedy, 34 W. N. C. (Pa.) 83; alimony should be granted her out of it. Alimony will also be enforced out of property conveyed by the husband in fraud of the wife, either directly, by subjecting it to execution, when it has been conveyed after the decree: *Conrad v. Everich*, 50 Ohio St. 476; or by setting aside the conveyance on bill in equity, when it has been conveyed pending suit: *Frakes v. Brown*, 2 Blackf. (Ind.) 295; *Livermore v. Boutelle*, 11 Gray, (Mass.) 217; *Glick v. Glick*, (Mich.) 68 N. W. Rep. 153; *Bouslough v. Bouslough*, 68 Pa. 495; *Berg v. Ingalls*, 79 Tex. 522; *Damon v. Damon*, 28 Wis. 510; see *infra*, p. 525. But it cannot be enforced out of a pension: *Birch v. Birch*, 8 P. D. 163; unless that be assignable: *Willcock v. Terrell*, 3 Exch. D. 323; *Sansom v. Sansom*, 4 P. D. 69; see *Dent v. Dent*, 1 L. R. P. & D. 366; nor, in California, out of earnings of the husband after the granting of the divorce: *In re Spencer*, 82 Cal. 110.

**Laches—Married Women—Statute of Limitations—
Effect of Fraud—Dower—Equitable Estate—Holder of
Legal Title.**

McKNEELY ET AL. v. TERRY ET AL.

(Supreme Court of Arkansas. January 18, 1896.)

(61 Ark. 527; 33 S. W. Rep. 953.)

In an action to recover an interest in land which defendant's ancestor had conveyed to plaintiff in settlement of a controversy in regard to the land, it appeared that plaintiff was present at the time of such settlement, being then eighteen years old; and by the settlement the ancestor was to remain in possession for three years, when possession was to be given plaintiff's guardian, for plaintiff and certain others. Possession was given to the guardian; but, on his death, soon afterwards, defendant's ancestor again took possession, fraudulently secreting the deed to plaintiff, who was aware that he was accused of so doing, and enjoyed the rents and profits thereof for sixteen years, and sold a portion of the land. The ancestor promised at different times to let plaintiff in to enjoy his interest in the land. *Held*, that a finding that plaintiff was bound

by his laches from claiming his interest in the land would not be disturbed.

The statute of limitations against an action for recovery of land, the separate property of a *feme covert*, does not run during coverture.

A married woman may be barred by her laches from recovery of land constituting her separate estate.

Time does not run against a suit in equity for relief, on the ground of actual fraud, until discovery of the fraud, though the statute of limitations contains no exceptions in favor of one whose cause of action has been concealed by fraud.

That the grantor, on the death of his grantee, fraudulently abstracted the deed, and secreted the same, and possessed himself of the land, will prevent the heir of the grantee, a married woman, who was ignorant of the existence of such deed, from being guilty of laches in failing for sixteen years to sue for recovery of her interest in the land.

The wife of the owner of the legal title to land cannot claim dower therein, as a purchaser for value, as against the owner of the equitable title.

A claim by one tenant in common, for rents collected by his deceased tenant in common, is a claim against the deceased tenant's estate, and not against his heirs, and should be exhibited to his administrator; and on failure to do so, equity will not create a lien therefor on the deceased tenant's interest in the estate.

Cross appeals from Miller Chancery Court; RUFUS D. HEARN, Chancellor.

Suit by Mollie C. Terry and another against Mattie McKneely and others. From a judgment for plaintiff Terry alone, for only a portion of the relief sought, both parties appeal. Reversed.

Plaintiffs Mollie C. Terry and John D. Trigg, as the only heirs of John P. Dickson, deceased, seek to cancel a deed executed by him to Samuel W. McKneely to what is known as the "John Dickson Place," in Miller county, Arkansas. They say that said deed was procured through fraud and undue influence of McKneely, and that he, on being charged with the fraud, entered into a written obligation, in 1869, with David H. Dickson, by which he was to convey said place to the heirs of John P. Dickson, to wit, David H. Dickson,

John D. Trigg and Lavinia McKneely, wife of the said S. W., and that by said agreement he was to retain possession of the lands, having the exclusive enjoyment of the rents and profits for three years, when he was to surrender same to said heirs; that, in pursuance of said contract, in 1873, he surrendered said place to David H. Dickson, the father of plaintiff Mollie C., and guardian of plaintiff John D.; that David H. Dickson died in 1873, in possession, and that soon thereafter McKneely secretly abstracted said written obligation from the widow of the said David H. Dickson, and fraudulently repossessed himself of said lands. The bill alleges the death of Mrs. Lavinia McKneely, and that plaintiffs Mollie C. Terry and John D. Trigg are her sole heirs. Reasons for delaying suit are then set forth at length; plaintiffs W. L. and Mollie C. Terry claiming that they had been kept in ignorance of their rights by the fraud of McKneely, in taking and concealing the instrument which was the evidence of their title, and John D. Trigg claiming that delay on his part was occasioned by the repeated promises of McKneely to let him (John D.) in to enjoy his interest, which, it is alleged, he (McKneely) always recognized. It is alleged, also, that Mollie C. Terry was protected in her rights by infancy and coverture from the statute of limitation. The bill concludes with a prayer for a receiver, a restraining order, cancellation of the deed, decree of ownership in plaintiff's possession, rents and all proper relief. This bill was filed in March, 1889. In December, 1890, plaintiffs filed an amendment to the original bill, alleging that Samuel W. McKneely and his wife, Lavinia, at the time of the execution of the written obligation mentioned in the original, also executed deeds to David H. Dickson and John D. Trigg, which were delivered to David H., for himself and for John D. Trigg, his ward. They charge that these deeds were also secretly abstracted from the possession of the widow of David H. Dickson, but that the one made to David H. for himself had

been discovered since the commencement of the suit, and the other, if not destroyed by Samuel W. McKneely, had been burned, with other papers, in the house of Mrs. Dickson, in 1875. The amendment in detail explains why the deed to David H. Dickson was not discovered and produced before, and makes same an exhibit. Then, after alleging that McKneely had appropriated the entire rents for many years, amounting to several thousand dollars, it concludes with a prayer for an accounting, and as in the original. Mrs. Mattie McKneely, widow of Samuel W., demurred to the bill, which was overruled. She then answered separately, denying any ownership of plaintiffs in the lands sued for, and alleging a lack of information sufficient to form a belief as to the alleged fraud and undue influence of McKneely in procuring the deed; also, a lack of information sufficient to form a belief as to the alleged written agreement between McKneely and David H. Dickson for conveyances, possession, etc., as set forth in the bill. She pleaded staleness of plaintiff's claim and the statute of limitation, and set up, affirmatively, that she was entitled to dower as an innocent purchaser for value. For answer to the amendment to plaintiffs' bill, she alleged a want of information, etc., as to the execution of the deeds mentioned therein, and as to the knowledge of W. L. Terry and wife concerning same. She demurs to the claim for rents and profits, as being no cause of action against her, and suggests that there was an administration, and that the administratrix was a necessary party. The heirs of McKneely answered, denying any ownership of plaintiffs in the lands in controversy; also, the alleged fraud and undue influence in procuring the deed thereto, and the alleged written agreement of Samuel W. McKneely and his wife to convey to the heirs of John P. Dickson their alleged undivided interest and to yield to them possession after three years. They adopt the answer of Mattie McKneely, except as to the dower of Mrs. Sallie Hayden, which they deny she

has; and, by an amendment to their answer, in answer to the amendment to the original bill, they say that the instrument purporting to be a deed from Samuel W. McKneely to David H. Dickson was never acknowledged or perfected as a deed, and that no possession was ever taken under it; that the possession of David H. Dickson in 1873 was by the sufferance of McKneely, and that, after David H. Dickson died, McKneely again took possession in 1873, and held the same continuously till his death. The court appointed a receiver to take charge of the property when suit was begun, and a special master to state an account for rents, improvements, taxes, etc., from the time McKneely took possession till the institution of this suit; decreed to Mrs. Terry an undivided one-third interest in the lands sued for; gave judgment in her favor in the sum of \$8,857.10, the amount of rents for her share of the land; and decreed the same to be a lien upon the undivided two-thirds residue. Both parties appealed.

Scott & Jones, for appellant, Mattie McKneely.—1. The statute in this case commenced to run prior to April, 1876, as McKneely openly asserted *that the place was his, and he intended to keep it*. A married woman is chargeable with laches with respect to her separate property, the same as if she were discover. Her disabilities having been removed, she is, to the same extent, relieved of the consequences of coverture: 55 Ark. 85; 56 *Id.* 497; Freeman, Co-Tenancy, § 373.

2. McKneely was in possession, and declared it was his, and that he would keep it. Of this Mrs. Terry had knowledge, or by the exercise of ordinary diligence could have obtained knowledge. If the facts were concealed by John Trigg, this was not the fraud or concealment of McKneely. The fraudulent concealment must be that of the party sought to be charged: 39 Mich. 160; 16 Ark. 672; 17 *Id.* 199. Whatever is notice enough to excite

attention, and put the party on his guard, and call for inquiry, is notice of everything to which such inquiry might have led. When one has sufficient information to lead him to a fact he shall be deemed conversant of it: 3 Mylne & K. 722; Angell, Lim. § 187 n.; 11 Otto, 135. A party seeking to avoid the statute bar must show that he used due diligence to detect the fraud, and, if he had the means in his power to discover it, he will be held to have known it: 28 Miss. 432; 11 Otto, 135; 28 Fed. Rep. 275; 13 *Id.* 159; 21 Wall. 503; 6 Wheat. 481; 146 U. S. 88; 152 *Id.* 412. When the seal of death has closed the lips of him whose character is assailed, and lapse of time has impaired the recollection of transactions, and obscured their details, the welfare of society demands the rigid enforcement of the rule of diligence: 6 Wheat. 481; 143 U. S. 224. The claim is stale and barred by laches.

E. F. Friedell and Dan W. Jones & McCain, for appellants, the heirs of McKneely.—1. The claim is stale and barred by laches: 143 U. S. 224, 274.

2. The possession of one tenant in common is the possession of all; but if one ousts the other, or denies his tenure, his possession becomes adverse: 16 Pet. 455; 3 *Id.* 51; 23 Cal. 245. Courts of equity invariably discountenance laches and neglect, especially where death intervenes: 41 Ark. 301; 43 *Id.* 469, 483. Equity follows the law in matters of limitation: 41 *Id.* 484. Even in trusts the rule applies: 2 Wall. 87; 41 Ark. 301, 484. There is no pretense of concealment by McKneely. Arkansas is one of the few states in which the statute grants no indulgence where the cause of action has been concealed by defendant: Wood on Lim. § 274; 13 Ark. 291; 16 *Id.* 694; 32 Miss. 233; 101 U. S. 135. Mrs. Terry cannot tack her disability of coverture to that of infancy: Sand. & H. Dig. § 4815; 47 Ark. 301.

3. The decree for rent is erroneous, for several reasons.

The occupation by one co-tenant never raises an implied promise or creates an obligation to pay rent to the others: 48 Ark. 13; 4 Kent. Com. 369; Freeman, Co-ten. § 258; 31 Mich. 136; 30 Md. 120; 72 Ala. 567; 29 Minn. 252; 45 Iowa, 639; 12 Cal. 414; 23 La. An. 150. The decree must of course proceed on the theory of *adverse* holding. But three years is the limitation against the right to recover rent, both at law and in equity. As to the common-law rule, see Bouv. Law. Dict. "*Mesne Profits*," 46 Pa. St. 15; 3 Yeates, (Pa.) 13; 5 Vesey, Jr. 743; 10 *Id.* 469; Freeman on Co-ten. § 272; 48 Ark. 135. But see our statute: Sand. & H. Dig. § 2592. But the heirs are not liable for rents accrued before McKneely's death at all. Plaintiff's only remedy was to probate the claim against his estate: 18 Ark. 334; 39 *Id.* 577; 28 *Id.* 267; 43 *Id.* 457. But if they were, it was error to adjudge it a lien on the other co-tenants' share in the land: 52 Ark. 492; 56 *Id.* 624.

4. The administrator of McKneely was a necessary party, and should have been joined as defendant.

W. L. Terry and *L. A. Byrne*, for appellees.—1. The declarations of McKneely to Mrs. Hayden were not notice to Mrs. Terry, for she was not *the ancestor* of Mrs. Terry: 25 Mich. 188; 46 N. W. Rep. 533. But had the declaration been made to Mrs. Terry, she was then covert, and her action would have been preserved by the statute.

2. The deed from John P. Dickson to McKneely was obtained through fraud and undue influence upon an *inexperienced man* towards whom he occupied a *relation of trust and confidence*: 1 Story, Eq. Jur., p. 333 and note; 26 Ark. 604; 42 Md. 513; 6 Fla. 104; 6 Gill, (Md.) 41; 6 Mich. 111; 3 Jones Eq (N. C.) 496; 73 N. Y. 498; 41 Barb. (N. Y.) 326; 60 Miss. 1025; Ford v. Harrington, 16 N. Y. 285; 77 Mo. 396; Wait, Act. & Def., p. 478; 1 Perry on Trusts, §§ 166, 204, 210, 227; 35 Fed. Rep. 246. Upon the death of John P. Dickson his equitable estate descended to David H. Dickson, Lavinia

McKneely and John D. Trigg: Mansf. Dig. § 2540. They became tenants in common: Mansf. Dig. §§ 2535, 2541. When McKneely entered into possession the law will presume his possession to have been in right of his wife: Wood on Lim., p. 578; 32 N. J. L. 251; 2 Seld. (N. Y.) 342; 35 Ark. 89; 1 Am. & Eng. Enc. Law, p. 250. Thus, on Lavinia C.'s death, her one-third interest passed to Mrs. Terry and John D. Trigg. Mrs. Terry's rights were saved by Mansf. Dig. § 4471, as construed in 42 Ark. 305; 44 *Id.* 398. John D. Trigg's right was preserved by the *continued recognition of McKneely himself*.

3. The proof is clear that McKneely executed the conveyance in question in 1869, and in accordance therewith held possession until the close of 1872; that David H. Dickson then *took possession and died in such possession*, holding a deed from McKneely and wife for his undivided third interest. No right of action thus accrued in David H. Dickson's lifetime. At his death his title passed to his heirs: 77 Tex. 629. The mere possession by McKneely was not notice of an adverse holding: 46 Ark. 25; 48 *Id.* 248; 52 *Id.* 76; 52 *Id.* 168. Notice must be given of an adverse holding: Wood, Lim. § 266. The collection of rents for 1874 or 1875 was not sufficient to put Mrs. Terry on notice. But in 1874 she was a minor, and in October, 1875, she became covert, and no subsequent acts could change her: Wood on Lim., p. 559; Todd v. Todd, 117 Ill. 92; 1 Washburn, Real Prop., (5th ed.) p. 691. If Mrs. Terry was not put upon notice *before* her marriage, the statute did not run: 42 Ark. 301; Sand. & H. Dig. § 4815. The deed of 1867 was only notice to those who are bound to search the records, such as a subsequent purchaser or encumbrancer: Martindale on Conv. § 276.

4. Whether McKneely actually executed a deed or not for John D. Trigg's interest, the effect of the "short paper," as described by Mrs. Hayden, was to make McKneely a trustee under an *express* trust, and any subsequent repudia-

tion of that trust would have to be clearly brought home to the knowledge of the equitable owners before the statute would begin to run: 46 Ark. 25; 48 *Id.* 248; 52 *Id.* 76; *Id.* 168; Story, Eq. Jur. (13th ed.), vol. 2, p. 283; 44 Ark. 456. McKneely *never* denied the right and claim of Trigg.

5. In view of the fraudulent act of McKneely in making away with and concealing the papers, and the *want of knowledge* by Mrs. Terry of this fact, the statute will not run until there is a discovery: 101 U. S. 135; 2 Wall. (U. S.) 458; 120 U. S. 136; 21 Wall. 342-7; 3 Mass. 201; 5 Mason, (U. S.) 163; 12 Ga. 371; 35 *Id.* 40; 1 Pom. Eq. Jur., p. 415; 41 Ark. 305; 46 *Id.* 35; 26 Wis. 622; 21 N. W. Rep. 639. If this discovery is made during infancy or coverture, the statute only runs from the removal of the disability: Sand. & H. Dig. § 4815; 12 S. W. Rep. 1058; 79 Mo. 540; 21 N. W. Rep. 639; 46 Iowa, 655.

6. But, laying aside the question of infancy and coverture, under the peculiar circumstances of this case, the *obscurity* of the transaction, the relationship of parties, etc., Mrs. Terry was not guilty of laches: 2 Sch. & Lef. 474-487; 12 Pa. St. 49; 2 Story, Eq. § 1520; 78 N. Y. 159, 187; 9 H. L. Cas. 360, 383; 3 Wait, Act. & Def. 472; 152 U. S. 416; 56 Ark. 497.

7. Mrs. McKneely was not entitled to dower: 2 Ohio St. 417; 1 Washb. Real Prop. 228; Tiedeman on Real Prop. § 129; 1 Bishop, Mar. W. § 328; Scribner on Dower, vol. 1, pp. 267, 290, 369.

8. As to John D. Trigg, McKneely's possession was never adverse, as he always recognized his claim: 22 Ga. 288; Wood on Lim., p. 576; 12 Am. & Eng. Enc. Law, 559, 560; 56 Ark. 497.

9. McKneely was liable for rents *received* by him, and the three years statute is not applicable to him: Sand. & H. Dig. § 5917, 2592; 47 Ark. 531; 48 *Id.* 187. The court properly decreed them a lien on the land: 55 Ark. 100; Knapp on Partition, 385; Story, Eq. Jur., p. 663.

WOOD, J. (after stating the facts.)—The questions are: First: Was the deed from John P. Dickson to McKneely void for fraud and undue influence? Second: Did Samuel W. McKneely, in 1869, execute deeds to David H. Dickson and John D. Trigg to an undivided one-third in the lands in controversy; and did he enter into a written obligation with David H. Dickson, at the same time, by which he (McKneely) was to retain possession of the entire place for three years, and at the end of which time he was to surrender to the heirs; and was this agreement fulfilled? Third: If plaintiffs, Mollie C. Terry and John D. Trigg, have the legal title to an undivided interest in the whole or a portion of the lands in controversy, are they barred from recovery by laches or limitations? Fourth: Are plaintiffs, Mollie C. Terry and John D. Trigg, entitled to an undivided one-sixth, each, in the lands sued for, as the only heirs of Mrs. Lavinia McKneely? Fifth: Is Mrs. Mattie McKneely entitled to dower as an innocent purchaser for value? Sixth: Can plaintiffs, if they are decreed the owners of an undivided interest, recover rents for their share collected by McKneely in his lifetime; and can they have a lien for rents declared upon the undivided interest remaining in the heirs of McKneely?

1. Was the deed void? The circuit court, in an elaborate decree, in which we think the facts are accurately discussed, and the law correctly applied, found that there was no evidence to justify setting aside the deed. We are of the same opinion. A discussion of the facts leading to this conclusion could only be of interest to the parties litigant, and would serve no useful purpose as a precedent. The law is too well settled for discussion. The plaintiffs, therefore, cannot recover as to the heirs of John P. Dickson.

2. The chancellor found that, in 1869, McKneely executed conveyances to David H. Dickson and John D. Trigg, securing to them, respectively, the interest they claimed in the lands, and also executed an agreement by which he was

to hold the land for three years, after which he was to surrender the same; that McKneely did hold the lands for three years, and then gave possession to David H. Dickson, father of Mollie C. Terry, who held until he died, in 1873; that, after David H. Dickson's death, McKneely again took possession, and collected and appropriated to his own use the rents and profits until his death in 1889. These, also, are purely questions of fact, and the evidence fully supports the court's conclusion. This answers the second proposition, and determines the right of Mollie C. Terry, as the only heir of David H. Dickson, and of John D. Trigg, to recover under their deeds, unless they are barred by laches or limitations.

3. Are they barred? As to John D. Trigg, the court found that he was present when the settlement was had between McKneely and David H. Dickson, guardian of John D. Trigg, whereby the interest of John D. Trigg in the land was conveyed to him; that he was eighteen years old, and understood the agreement for McKneely to hold the land for three years, and for David H. Dickson to take possession at the end of that time; that he knew that McKneely repossessed himself of the land in 1873, after David H. Dickson's death; that at this time John D. Trigg was of age, and knew that McKneely had been accused of fraudulently taking and secreting the deeds to this land in the same year, 1873. And the court found that, for sixteen years, McKneely held the land, and collected and appropriated the rents of the entire place to his own use; that the rents amounted to a large sum, the place being valuable; that, at various times before McKneely's marriage with the defendant, Mattie, in ———, John D. Trigg applied to him to be let in to enjoy his interest, and was always refused; that plaintiff, John D. Trigg, had labored under no disability since 1873; that, about four years before the bringing of this suit, he had been informed by McKneely that McKneely had leased the lands for five years, and therefore could not let him (John D.) in

to enjoy his interest. The court found that McKneely, in 1878, had sold a valuable portion of the land, and had appropriated the purchase money to his own use, and that this John D. Trigg knew. These findings are supported by the evidence. There was testimony by John D. Trigg and others to show that McKneely had repeatedly recognized John D. Trigg's interest in the land—in fact, had never denied it—and had often promised to let him in to enjoy his interest. John D. Trigg claimed and testified that his neglect to sue earlier was by reason of these promises, and because of McKneely's continued recognition of his interest; but the court found that John D. Trigg must have known that McKneely's possession was adverse, and concluded that his delay in bringing his suit was "unreasonable and unjustifiable." This conclusion was certainly correct, if McKneely's actions, as disclosed by the record, were of more weight and significance than his promises and professions. The learned chancellor thought they were, and the preponderance, we think, sustains his findings. There was no error in dismissing the bill as to plaintiff, John D. Trigg.

As to the plaintiff, Mrs. Terry, it appears that her ancestor, David H. Dickson, died in possession of the land in controversy, in 1873. At that time she was sixteen years of age. Two years after she intermarried with W. L. Terry, when she was something over eighteen. The deeds to David H. Dickson and John D. Trigg conveyed to each an undivided one-third interest in the lands sued for, McKneely retaining an undivided one-third. It is not contended that McKneely ever executed any deed to his wife for an undivided one-third, but only that he agreed to do so. Be that as it may, if McKneely was under any obligation to convey the land to his wife in 1873, when he repossessed himself, the presumption would be that his possession was in subordination to her title, legal or equitable: 1 Am. & Eng. Enc. Law, 250, and cases cited; *Corwin v. Corwin*, 6 N. Y. 342, and cases cited; 1 Wood, Lim. 578; *Banks v. Green*,

35 Ark. 89. If the title to the undivided one-third remaining was not in his wife, it was in him, and, in either case, his possession was that of a tenant in common with Mollie C. Terry and John D. Trigg, and continued so to be until some act so open, notorious and unequivocal as to operate as notice to his co-tenants that his holding was adverse: 2 Wood, Lim. 258. See, also, *Bryan v. City of East St. Louis*, 12 Ill. App. 397. "It is," says Mr. Angell, "from the nature of the estate that a tenant in common of land, in the enjoyment of his rights, must, necessarily, *prima facie*, be in possession of the whole:" Ang. Lim. 429. "The possession, therefore, of one tenant in common is the possession of all:" 2 Wood, Lim. 266. Prior to an interview which Mrs. Hayden had with McKneely in 1876, in which he stated that the place was his, and he intended to keep it, there is nothing to show that his possession was adverse to his co-tenants. There is no proof that he entered upon the land in 1873 as sole owner. There was evidence tending to show that McKneely, in 1875, had abstracted the deed, which was the only evidence of title in the heirs of David H. Dickson, and while this might have indicated a purpose to claim the land as his own, yet, if so, it was a secret purpose, for the abstraction was secret, and would not operate as notice of an adverse holding. And although Mrs. Dickson may have discovered the same a short time thereafter, there is no evidence that she communicated the fact to Mrs. Terry at a time when she was under no disability. There was also proof that McKneely had collected and appropriated the rents for the year 1874, and had rented the place for the year 1875, though it is doubtful if he had collected the rents for 1875, before the marriage of plaintiff, Mollie C. Terry, in October, 1875. But the pernancy of the rents, although for the whole statutory period, would not, of itself, be conclusive evidence of an ouster of his co-tenants by McKneely, because that is susceptible of explanation consistent with his rights as co-tenant. In order to set the statute in motion

he must have absolutely denied the title of his co-tenants, or by other notorious acts have indicated his intention to claim and hold the estate exclusively: 2 Wood, Lim. 266, and cases cited; Ricard v. Williams, 7 Wheat. 59, 121; Prescott v. Nevers, 4 Mason, (U. S.) 326, Fed. Cas. No. 11,390; Jackson v. Tibbits, 9 Cow. (N. Y.) 241; Parker v. Proprietors, 3 Metc. (Mass.) 91; Ang. Lim. 429; McClung v. Ross, 5 Wheat. 116; Todd v. Todd, 117 Ill. 92, 7 N. E. Rep. 583. See, also, Sydnor v. Palmer, 29 Wis. 226. The first unequivocal act indicating an intention on the part of McKneely to hold adversely to his co-tenants was his declaration to that effect made to Mrs. Dickson in 1876. The second was the sale, in his own name, of a valuable portion of the place in 1878 to Elias Pickett, and the appropriation of the money received therefor to his own use: Clapp v. Bromagham, 9 Cow. (N. Y.) 530. Mollie C. Terry, however, was a *feme covert* when both these occurred, and expressly protected by the statute of limitation: Sand. & H. Dig. § 4815. True, this court, in Gibson v. Herriott, 55 Ark. 85, 17 S. W. Rep. 589, said: "The disabilities of coverture in respect to her separate property having been removed, she is to the same extent relieved of its consequences." But this language is only applicable to the assertion of her rights, as to her separate property, in all cases where the statute has not made an exception protecting her. It is applicable, of course, to the statute pertaining to judicial sales, for she is not excepted from its operation: Sand. & H. Dig. § 4818; Batte v. McCaa, 44 Ark. 398; McGaughey v. Brown, 46 Ark. 25.

Plaintiff Mollie C. Terry was not barred by the statute of limitation. Is she barred by laches? As was held in Gibson v. Herriott, *supra*, a married woman, with reference to her separate property, may be guilty of laches as though she was discover. It is alleged, in the amendment to the original bill, that the deed of David H. Dickson was secretly abstracted and made away with by McKneely, and that they (plaintiffs) had no knowledge or information of the exist-

ence of such deed until after the commencement of this suit, and that the commencement of the suit was prevented by the wrongful conduct of McKneely in taking and carrying away said deed, and fraudulently concealing from said plaintiffs any and all knowledge of its existence. This was a sufficient replication to the plea of laches. The heirs of McKneely, in the amendment to their answer, say "that the deed was not acknowledged and perfected as an instrument of conveyance, and no possession was ever held under it by David H. Dickson." It is clear, from the proof, that the deed was made and delivered to David H. Dickson as alleged. It therefore passed the title, between the parties to it and their heirs, whether acknowledged or not: *Floyd v. Ricks*, 14 Ark. 294. In the language of the learned chancellor below, "the deed was the best evidence of Mrs. Terry's rights, and the most effective instrument to enforce them." The court found that the deed under which Mrs. Terry claimed was "fraudulently taken away and kept concealed by McKneely." The proof justified this finding. How does it affect the question of laches? It is contended by appellants that, as the statute (§ 4815, Sand. & H. Dig.) makes no exception as to a cause of action fraudulently concealed, the courts can make none, and that this holds good as to both courts of law and equity, as the statute in express terms is made applicable to both. Section 4846, Sand. & H. Dig., provides "that if any person, by leaving the county, absconding or concealing himself, or any other improper act of his own, prevent the commencement of any action in this act specified, such action may be commenced within the terms respectively limited after the commencement of such action shall have ceased to be prevented." The words "any other improper act of his own" would seem to be broad enough to cover cases of fraud. But, aside from this statute, the result would be the same. "It is the established rule of equity, as administered in the courts of the United States, that where relief is asked, on

the ground of actual fraud, especially if such fraud has been concealed, time will not run in favor of the defendant until the discovery of the fraud, or until, with reasonable diligence, it might have been discovered." *Kirby v. Railroad*, 120 U. S. 130, 7 Sup. Ct. Rep. 430; *Meador v. Norton*, 11 Wall. 442; *Prevost v. Gratz*, 6 Wheat. 481; *Rosenthal v. Walker*, 111 U. S. 185, 4 Sup. Ct. Rep. 382; 2 Story Eq. Jur. § 1521a; *Veazie v. Williams*, 8 How. 134. See, also, *Jones v. Van Doren*, 130 U. S. 684, 9 Sup. Ct. Rep. 685. And while it is true that the United States courts, possessing the same equity jurisdiction as the high court of chancery in England, have a uniform system of equity rules and practice, which they administer in each state untrammelled by local laws, (*Kirby v. Railroad*, *supra*.) yet the above announces the correct doctrine in equity, as applied by the state courts generally, although their statutes, like ours, may contain no exception in favor of one whose cause of action has been concealed by fraud: Ang. Lim. § 183; Busw. Lim. § 385; 2 Wood, Lim. § 275; *Turnpike Corp. v. Field*, 3 Mass. 201; *Bland v. Fleeman*, 58 Ark. 84, 23 S. W. Rep. 4. See, also, *McGaughey v. Brown*, 46 Ark. 25. The reason of the rule is that one shall not be permitted to take advantage of his own wilful wrong. In a court of conscience, as Lord REDESDALE expresses it, "the statute ought not to run; the conscience of the party being so affected that he ought not to be allowed to avail himself of the length of time." *Hovenden v. Lord Annesley*, 2 Schoales & L. 634; Busw. Lim. § 22; *Evans v. Bacon*, 99 Mass. 213; *Traer v. Clews*, 115 U. S. 538, 6 Sup. Ct. Rep. 155; *Troup v. Smith's Ex'rs*, 20 Johns. (N. Y.) 33; *Callis v. Waddy*, 2 Munf. (Va.) 511. Our statute is, in express terms, made applicable to suits in equity as well as law: Sand. & H. Dig. § 4815. It follows, from the language employed, that no exception could be made in equity that would not also be applicable at law. But, even at law, while there is decided conflict, the weight of authority and the better reason is in

favor of the view that a cause of action kept fraudulently concealed will stop the bar of the statute, in favor of the one against whom the fraud is perpetrated, until the fraud is or should have been discovered. As is said by Mr. Justice MILLER in *Bailey v. Glover*, 21 Wall. 342: "To hold that, by concealing a fraud, or by committing a fraud in a manner that it concealed itself until such time as the party committing the fraud could plead the statute of limitations to protect it, would be to make the law which was designed to prevent fraud the means by which it is made successful and secure:" Ang. Lim. § 186; *Turnpike Corp. v. Field*, 3 Mass. 201; *Homer v. Fish*, 1 Pick. (Mass.) 435; *Welles v. Fish*, 3 Pick. (Mass.) 74; *Farnam v. Brooks*, 9 Pick. (Mass.) 212; *Sherwood v. Sutton*, 5 Mason, (U.S.) 143, Fed. Cas. No. 12,782; *Mitchell v. Thompson*, 1 McLean, (U. S.) 96, Fed. Cas. No. 9,669; Busw. Lim. § 390; *Duffitt v. Tuhan*, 28 Kans. 292; *Yniestra v. Tarleton*, 67 Ala. 126; *Cole v. McGlathry*, 9 Me. 131; *Bishop v. Little*, 5 Me. 362; *Douglas v. Elkins*, 28 N. H. 26; *Bank v. Forster*, 8 Watts, (Pa.) 12; *Andrews v. Smithwick*, 34 Tex. 544; *Miles v. Berry*, 1 Hill, (S. Car.) 296.

No mere ignorance on the part of plaintiff of his rights, nor the mere silence of one who is under no obligation to speak, will prevent the statute bar. There must be some positive act of fraud, something so furtively planned and secretly executed as to keep the plaintiff's cause of action concealed, or perpetrated in a way that it conceals itself. And if the plaintiff, by reasonable diligence, might have detected the fraud, he is presumed to have had reasonable knowledge of it: Busw. Lim. § 385; Story, Eq. Jur. § 152; *Piper v. Hoard*, 65 How. Pr. (N. Y.) 228; *Underhill v. Insurance Co.*, 67 Ala. 45; *Ramsey v. Quillen*, 5 Lea, (Tenn.) 184; *Adams v. Inhabitants of Ipswich*, 116 Mass. 570; *Wood v. Carpenter*, 101 U. S. 135; *Tyler v. Angevine*, 15 Blatchf. (U. S.) 536, 541, Fed. Cas. No. 14,306; *Eiffert v. Craps*, 7 C. C. A. 319, 58 Fed. Rep. 470. See, also, *McAlpine*

v. Hedges, 21 Fed. Rep. 689. Had Samuel W. McKneely surrendered the deed which he had taken away to Mrs. W. L. Terry, or some one for her, instead of giving it to one of his own relatives, with instructions "to take good care of it," as the proof shows he did, doubtless we would not now have been discussing the question of laches. That deed would have made her title clear. Without it, her rights were involved in such a tangled web as to preclude the idea of laches for not attempting to assert them. She did not know of the existence of the deed, and by no reasonable inquiry could she have ascertained any facts that could lead to its discovery. The same purpose which caused its removal in the first place doubtless controlled in its concealment, and it was only a mere chance that brought it to plaintiffs' possession. There is evidence that, on one occasion, plaintiff Mollie C. Terry had heard her mother say that her uncle, Samuel W. McKneely, had come to her house after her husband's death, and made away with some paper or written obligation relating to the John Dickson land. But there is also evidence to the effect that she did not believe what she heard. If the deed was fraudulently taken away and kept concealed by the machinations of McKneely, as the court below found and the evidence tends to show, is Mrs. Terry to be charged, by those who stand in his shoes, with laches, for refusing to suspect him of dishonesty and fraud? We think not: *Kilbourn v. Sunderland*, 130 U. S. 505, 9 Sup. Ct. Rep. 594. And, even if her suspicions had been aroused by what she had heard, suspicion is not discovery: *Marbourg v. McCormick*, 23 Kans. 38. But, if she should have suspected, and if her suspicions should have led to inquiry, then, even, the proof shows she has met every requirement that could have been reasonably expected in that particular through her husband, W. L. Terry. The testimony is voluminous, but our conclusion, from a careful consideration of it, is that the court was correct in holding that Mrs. Terry was not barred by laches.

and in decreeing to her an undivided one-third interest in the lands sued for, as the heir of David H. Dickson.

4. As to whether plaintiffs Mollie C. Terry and John D. Trigg were each entitled to an undivided one-sixth interest in the lands sued for, as the heirs of Mrs. Lavinia McKneely, the court made no special finding, but found, generally, that there was nothing in their contention in this particular. This was correct. It is exceedingly doubtful whether McKneely ever entered into a contract to convey to his wife an undivided one-third interest in the lands sued for. There is nothing to show that she was asking or insisting upon anything of the kind herself, or that David H. Dickson, who is said to have procured such a contract, was ever authorized or empowered to act for her. She lived almost seven years after said contract is alleged to have been made, and it appears she died perfectly satisfied, and there is nothing to show that she ever claimed any interest in the land. It had been twenty years since the alleged agreement was said to have been made, and thirteen years since Mrs. Lavinia's death. After such a great length of time, her heirs should not be granted a decree, in the nature of specific performance of an alleged executory contract, except upon proof most clear and convincing. In this case it is too vague and uncertain to warrant such a decree. The plaintiffs, therefore, as the heirs of Lavinia McKneely, take nothing by their cross-appeal.

5. Mrs. Mattie McKneely could not assert a claim for dower, as an innocent purchaser for value, against the plaintiffs. McKneely, her husband, was not seised, at his death, of an estate of inheritance in the lands of which plaintiff Terry has been adjudged the owner: Sand. & H. Dig. § 2520. The legal estate was in McKneely, but the equitable estate was in the plaintiffs, and no right of dower can be set up against such a title: 1 Wash. Real Prop. p. 228.

6. Was Mrs. Terry entitled to rents, and to a lien for the

same upon the share of the co-tenants? Section 5917, Sand. & H. Dig., makes a tenant in common liable to his co-tenants for rents, where he has "taken, used or had the benefit thereof in greater proportion than his interest." There can be no doubt that a court of equity, according to the principles above discussed, will extend the time for recovery, where the cause of action has been fraudulently concealed, to the statutory period after the fraud has been, or by ordinary diligence should have been, discovered: *Id.* § 4846. Samuel McKneely died February 17, 1889. This suit was begun the 6th of March following. There was an administration upon the estate of Samuel W. McKneely, as was alleged in the amendment to Mrs. McKneely's separate answer, and which was nowhere denied. The claim of Mrs. Terry for rents collected by McKneely during his life was a demand against his estate, and not against his heirs. No judgment could be legally rendered against them for such a demand. But the plaintiffs' claim was a subsisting demand against the estate of McKneely at the time of his death, and, under the plain letter of our statute, and the decisions, the demand should have been duly authenticated and exhibited to the administratrix: *Id.* § 110, subd. 5; *Id.* §§ 113-115; *Walker v. Byers*, 14 Ark. 246. But, if it be said that the cause of action as to rents did not accrue until after the discovery of the deed by plaintiff Mrs. Terry, still that would not relieve her; for the deed was discovered in less than a year after McKneely's death, according to the allegations of her bill. The claim, nevertheless, should have been properly exhibited: *Byers v. Walker*, *supra*; *Bennett v. Dawson*, 18 Ark. 334. See, also, *Patterson v. McCann*, 39 Ark. 577; *Morgan v. Hamlet*, 113 U. S. 449, 5 Sup. Ct. Rep. 583. Mrs. Terry has not established, in the manner prescribed by our statutes, her claim for rents. Until she has done so, plainly, she could not go into a court of equity and ask that a lien be declared upon the share of a co-tenant for such claim or demand. If there be a lien, (which, in the view we have

taken, it becomes unnecessary to decide,) she has no standing in a court of equity to enforce it; for the lien in such a case would be the pure creation of a court of equity, growing out of no legal or contractual estate, not a right of property, but a mere remedy, bottomed solely upon the debt or demand, and having no independent form and foundation for its enforcement. So it was held by this court in the case of a vendor's lien, and, by analogy, and with even greater reason, is the principle applicable here: *Linthicum v. Tapscott*, 28 Ark. 267. See, also, *Stephens v. Shannon*, 43 Ark. 464; *Waddell v. Carlock*, 41 Ark. 523. The decree in favor of Mrs. Terry for an undivided one-third interest in the land was correct. The decree as to rents accruing prior to McKneely's death was erroneous. The cause is, therefore, reversed and remanded, with directions to enter a decree in accordance with this opinion, and for further proceedings.

BATTLE, J., being disqualified, did not sit in this case.

DOWER OF WIFE OF HOLDER OF LEGAL TITLE TO EQUITABLE ESTATE.

Although at common law dower attached only to legal, and not to equitable estates: *Chaplin v. Chaplin*, 3 P. Wms. 229; *D'Arcy v. Blake*, 2 Sch. & Lef. 387; *Smith v. Adams*, 5 De G., M. & G. 712; *Williams v. Barrett*, 2 Cr. C. C. 673; *In re Ransom*, 17 Fed. Rep. 331; *Blakeney v. Ferguson*, 20 Ark. 547; *Gully v. Ray*, 18 B. Mon. (Ky.) 107; *Mann v. Edson*, 39 Me. 25; yet the wife of the holder of the legal title to land to which another is entitled beneficially, has never been allowed dower therein: *Noel v. Jevon*, 2 Freem. 43; *Finch v. Winchelsea*, 1 P. Wms. 278; *Hinton v. Hinton*, 2 Ves. Sen. 630; *Powell v. Mfg. Co.*, 3 Mason, (U. S.) 347; *Robison v. Codman*, 1 Sumn. (U. S.) 121; *Cowman v. Hall*, 3 Gill & J. (Md.) 398; *R. R. Co. v. Lampson*, 47 Barb. (N. Y.) 533; *Greene v. Greene*, 1 Ohio, 535; *Derush v. Brown*, 8 Ohio, 412; *Firestone v. Firestone*, 2 Ohio St. 415. This rule applies to all cases of trust, implied as well

as express, resulting, constructive, or what not. *E. g.*, the widow of a grantee who holds the premises in trust for the one who advances the purchase price cannot have dower therein: *Ragsdale v. O'Day*, 61 Mo. App. 230; see *Vance v. Vance*, 118 N. C. 864. So, when one has agreed, by an agreement enforceable in equity, to convey land to another, and afterwards marries, his wife acquires no dower in the land agreed to be conveyed, though he retain the legal title as security for the payment of the purchase money; and this doctrine rests upon the double ground that by the agreement the grantor holds the legal title in trust for the grantee, who acquires an equitable title by the agreement, and that the agreement works a conversion of the grantor's interest in the land into personalty, to which dower cannot attach, as well as upon the further consideration that it would be inequitable thus to permit the grantor to burden the estate granted with the encumbrance of dower: *Kintner v. McRae*, 2 Carter, (Ind.) 453; *Oldham v. Sale*, 1 B. Mon. (Ky.) 76; *Gaines v. Gaines*, 9 B. Mon. (Ky.) 295; *Gully v. Ray*, 18 B. Mon. (Ky.) 107; *Hunkins v. Hunkins*, 65 N. H. 95; *McClure v. Fairfield*, 153 Pa. 411. Further, the interest of the mortgagee of premises which would ordinarily be subject to dower is personalty, and his wife can have no dower therein unless he has foreclosed during his lifetime: *Nash v. Preston*, Cro. Car. 190; *Noel v. Jevon*, 2 Freem. 43; *Hinton v. Hinton*, 2 Ves. Sen. 630; *Crittenden v. Johnson*, 11 Ark. 94; *Foster v. Dwinel*, 49 Me. 44; *Cooper v. Whitney*, 3 Hill, (N. Y.) 94; *Reid v. Shepley*, 6 Vt. 602; *Waller v. Waller*, 33 Gratt. (Va.) 83.

Election—Injunction against—Apportionment Act—Constitutionality.

FESLER ET AL. v. BRAYTON.

(Supreme Court of Indiana. May 15, 1896.)

(44 N. E. Rep. 37.)

A suit to enjoin the holding of an election for members of the legislature under a certain apportionment act, on the ground that it was unconstitutional, should not be entertained, if there is no other act under which it could be held. *MONKS, J.*, dissenting.

Appeal from Superior Court, Marion county; J. L. McMASTERS, Judge.

Suit by Alembert W. Brayton against James W. Fesler, clerk of court, and others. Judgment for plaintiff, and defendants appeal. Reversed.

Hawkins & Smith, for appellants.

Miller, Winter & Elam, M. E. Forkner and A. C. Harris, for appellee.

MCCABE, J.—The appellee sued the appellants in the superior court to enjoin them from proceeding to hold the election in November for members of the next general assembly under the provisions of the apportionment act approved March 6, 1885. It was alleged that the appellants, being the clerk of the circuit court, the auditor and the sheriff of Marion county, Indiana, were threatening to give notice and proceed to an election under said act, which act, it was alleged, is unconstitutional, for the same reason that the apportionment acts of 1879, 1891, 1893 and 1895 were adjudged by this court to be unconstitutional, in *Parker v. State*, 133 Ind. 178, 32 N. E. Rep. 836, and 33 N. E. Rep. 119, and in *Defney v. State*, 42 N. E. Rep. 929. The superior court overruled a demurrer to the complaint

for want of sufficient facts, and the defendants declining to plead over, and standing upon their demurrer, the court rendered judgment perpetually enjoining said officers from proceeding to hold said election under and pursuant to said act. The ruling upon the demurrer is the only error assigned.

A motion to dismiss the appeal is made by Alonzo G. Smith, Charles A. Korbly and John W. Kern, as *amici curiæ*, and on behalf of certain other parties who are not parties to the action, and who it is alleged would be injuriously affected by the litigation. In support of this motion is filed an affidavit of Sterling R. Holt, to prove the charge made in the motion that "the controversy is not real; that all the parties thereto are agreed in principle and purpose concerning the same; and that said action, from its inception, has been, and is, collusive, and the result of collusion between the parties thereto, all of whom are desirous of obtaining from this court an affirmance of the judgment appealed from, there being no adverse interest represented." If these facts were conceded or clearly shown by the affidavits and record, we should feel compelled to sustain the motion, as the law is well settled that such a litigation may and ought to be regarded as a contempt of court: *Hoover v. Hanna*, 3 Blackf. (Ind.) 48; *Brewington v. Lowe*, 1 Ind. 21; *Hotchkiss v. Jones*, 4 Ind. 260; *Smith v. Railway Co.*, 29 Ind. 546; *Osborn v. Bank*, 9 Wheat. 738; *Lord v. Veazie*, 8 How. 251; *State v. Napton*, (Mont.) 25 Pac. Rep. 1045; *Haley v. Bank*, (Nev.) 26 Pac. Rep. 64. Counter affidavits have been filed by the parties and counsel in opposition to the charge of collusion. Other circumstances have occurred in this court tending to overcome the charge. But we deem the merits of the controversy of so much importance to the people that we do not pass upon the conflict raised by the affidavits, and will pass the question of dismissal without decision. The brief on behalf of the appellants makes a point for reversal which is entitled to much consideration, namely, it is therein contended with

much apparent earnestness that "the act of 1885 was accepted by the people and acted upon without question, and three successive general assemblies were elected under it before any further legislation upon the subject was attempted and before any question of its constitutionality was raised, and . . . no attempt was ever made or suggested to test its validity or constitutionality in the courts. The law having been accepted and acted upon, as it has been without question by the people, . . . we insist that it is now too late to raise the question as to its validity upon the grounds stated in the complaint." This contention is not without weight or merit, especially as this is an attempt to invoke the equity powers of the court by injunction. "Equity aids the vigilant, not those who slumber on their rights. . . . The principle thus used as a practical rule controlling and restricting the award of relief is designed to promote diligence on the part of suitors, to discourage laches by making it a bar to relief, and to prevent the enforcement of stale demands of all kinds, wholly independent of any statutory periods of limitation. It is invoked for this purpose in suits for injunction, suits to obtain remedy against fraud, and in all classes of cases, except perhaps those brought to enforce a trust against an express trustee. . . . A court of equity, which is never active in relief against conscience or public convenience, has always refused its aid to stale demands where the party has slept upon his rights and acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith and reasonable diligence:" 1 Pom. Eq. Jur. (1st ed.) §§ 418, 419; *Brashear v. City of Madison*, 142 Ind. 685, 42 N. E. Rep. 349; *Jones v. Cullen*, 142 Ind. 335, 40 N. E. Rep. 124; *Rumsey v. People*, 19 N. Y. 41.

In addition to the fact that the appellee does not point out any other apportionment act than that of 1885, or claim that any such exists under which an election may be held, we may observe that he agrees with the contention of the

amici curiæ that all legislative apportionment acts previous to that of 1879, under the present constitution, including the apportionment act under which that constitution required the first and second legislative elections to be held, were required to be, and were, based on an enumeration exclusively of the white male inhabitants of the state: Const. 1816, art. 3, § 2; Rev. St. 1843, p. 44; Const. 1851, art. 4, §§ 3-5; Rev. St. 1852, pp. 48, 49; Enumeration Act 1865, Acts 1865, p. 41; (Rev. St. 1881, §§ 4780, 4798; Rev. St. 1894, §§ 6351, 6369;) Supp. Enumeration Act 1877, Acts 1877, p. 59; (Rev. St. 1881, § 4799; Rev. St. 1894, § 6370.) By the amendment to the constitution of March 14, 1881, the sections of the constitution above referred to were so amended as to require such enumerations and apportionments to be based on the number of male inhabitants of the state over the age of twenty-one years, both white and colored: Rev. St. 1894, §§ 99-101; (Rev. St. 1881, §§ 99-101.) All the apportionment acts, therefore, which preceded that of 1879, being based exclusively on the white male inhabitants of the state above the age of twenty-one years, and leaving out all colored males of that age, are wholly inconsistent with the requirements of the constitution since its amendment above mentioned, requiring all colored as well as white males, over twenty-one years of age, to be represented in the apportionment for legislative purposes. It is settled law in this and other states that a constitutional amendment inconsistent with previous constitutional provisions and legislative enactments operates to repeal such constitutional provisions and legislative enactments: *Griebel v. State*, 111 Ind. 369, 12 N. E. Rep. 700, and authorities there cited; *Pierce v. Delamater*, 1 N. Y. 17; *Potter's Dwar. St.* 113; *Sedg. St. Const. Law*, 107.

The learned counsel for appellee not only frankly concede, but earnestly insist that all apportionment acts prior to that of 1879 have been repealed by the above-mentioned constitutional amendment, and that the only act not so re-

pealed or declared by this court to be unconstitutional is that of 1885; so that it is undeniable that all legislative apportionment acts previous to that of 1879 have been effectively repealed. All apportionment acts subsequent to that of 1885, as well as the act of 1879, have been adjudged unconstitutional by this court: *Parker v. State*, 133 Ind. 178, 32 N. E. Rep. 836, and 33 N. E. Rep. 119; *Denney v. State*, (Ind. Sup.) 42 N. E. Rep. 929. There are several reasons why the act of 1885 has not been repealed: First: There has been no constitutional amendment, either state or federal, adopted since its enactment inconsistent with its provisions. Second: The several apportionment acts of 1891, 1893 and 1895, assuming to supersede it, having proven unconstitutional, the repeal in each one of these acts falls to the ground by the settled adjudication of this court, because it appears from the several repealing clauses that it was only intended to repeal the former apportionment acts upon the supposition that the new act was to take the place of the former acts upon the subject: *Denney v. State*, *supra*; *State v. Blend*, 121 Ind. 514, 23 N. E. Rep. 511, and cases there cited. And a third reason is that it is justly held in *Denney v. State*, *supra*, that the legislature may not wantonly sweep away all means of electing another legislature.

Thus, we are confronted with the preliminary question to be determined before we enter upon the investigation of the alleged unconstitutionality of the apportionment act of 1885; and that question is: Can the appellee have any right to invoke the power of this court to dissolve the state government? Can any citizen of this state have the right to invoke the power of the judiciary by injunction to put an end to the government that protects his life, his liberty and his property? The proposition the appellee presents, stripped of all subterfuges, is, that, unless the governor shall convene the legislature in extra session, there shall be no more elections of legislatures in this state under our constitution. But suppose we respond to the demand of the ap-

pellee, and, having entered the field of investigation, find the act of 1885 defective, and strike it down, and start the people of this state on a voyage that may lead them into the troubled sea of anarchy; and suppose even that the governor shall forego his resolution not to call an extra session of the legislature, and should actually convene it, and it should refuse to act, or, consenting, should pass another act as bad as the one passed in 1885, and which this court should be compelled to declare unconstitutional. The government of the state would be at an end. As was said in *Denney v. State*, *supra*, the people in the constitution have provided that all the officers except members of the legislature shall hold their respective offices during the term for which they were elected, and until their successors were elected and qualified. We may notice, in passing, that such provision points unerringly to the design of the framers of the constitution that the functions of the government, executive and administrative, should not come to an end for want of persons authorized to perform them. But as to members of the general assembly, for important and obvious reasons, a different rule was provided. That rule is that each member's official career and authority ends with the end of the term for which he is elected, whether his successor is elected or not. Therefore, if there is no law in force for the election of a legislature, and the existing legislature expires without enacting such a law, the legislative department of the state government is at an end. The other two departments must soon expire if there be no legislative department. A careful study of the whole subject convinces us that it was the intention of the framers of the supreme law to impress on its every feature the principle of perpetuity in the government. If the scheme of the appellee may be effectuated, that noble aspiration of the founders of our state government may be defeated at the suit of a single individual, by the invocation of the power they vested in the judiciary. As before ob-

served, if the legislative department may be thus annihilated, the other two departments must soon perish for want of sustenance by the legislative department. And all departments being thus extinguished, the constitution also must die, because in that event society must be reorganized, and the constitution would have no force unless adopted by the new organization. As well ask this court to overthrow, not one provision of the constitution, but every provision of the whole constitution. The case before us, though undoubtedly not so intended, is, in reality, an attack upon the integrity of the state government. This court, while free to consider and decide causes at such times and in such manner as to it shall seem right and proper under the constitution and the law, yet can never be authorized so to act as to put an end to its own existence, or to the existence of any coordinate branch of the state government. Any law, however defective, must stand so long as such law is necessary for the continued movement of the political organization formed by the people. It was in this spirit that the framers of the constitution provided in article 4, § 5, "that the first and second elections of members of the general assembly, under this constitution, shall be according to the apportionment last made by the general assembly before the adoption of this constitution." A reference to the apportionment so confirmed will show that it was not constructed in accordance with the provisions of the supreme law itself; and yet it is confirmed and adopted for the simple and all-sufficient reason that some law was necessary under which a legislature might be chosen. Even a defective law would be upheld, rather than that there should be no law for the election of a general assembly. The constitution of the United States itself would compel the recognition of such a law for the election of a legislature as valid at least until another could be enacted to take its place. In article 4, § 4, of the federal constitution, it is provided that "the United States shall guaranty to every state in this Union a republican

form of government ;" and it is impossible for us to conceive of a republican form of government without the election by the people of representatives in the general assembly.

The principle which required that the last apportionment law under our old constitution should be held valid, and which requires also that the law of 1885 should be held valid, notwithstanding any constitutional defect which might exist in either, is not essentially different from the principle in accordance with which invalid proceedings in the government of municipalities are legalized by acts of the legislature, namely, that the life of the municipality in the one case, and of the state in the other, should be preserved. The state cannot die, and neither this court nor any other tribunal is authorized to do aught that may endanger its existence. In like manner in a constitutional monarchy, it is not admitted that any interval of time exists between the death of one ruler and the accession of another. The cry of the herald is the voice of the law: "The king is dead! Long live the king!" So here, also, when a great president was stricken down by the hand of an assassin, there was heard, in the voice of one destined to be his successor, that sublime and inspiring declaration, "The government at Washington still lives!" It will not be admitted, either in the nation or in the state, that the government or any of its co-ordinate branches shall ever cease to exist. The machinery set in motion by the people for the creation of the legislature, the executive and the courts, is, so to say, a living organism, and can never cease to act. Least of all should the judiciary, the guardian of the constitution, aid in destroying the government which has its very being in the constitution.

The learned counsel for the appellee do not deny that these consequences would follow the overthrow of the act of 1885 in case of failure of the governor to convene the legislature in time to pass a new apportionment act previous to the approaching November election, or, in case of his con-

vening that body, if it should fail to pass a valid apportionment act; but some of them insist that the idea that the executive or legislature either will fail to do their duty is "unthinkable." We presume counsel mean by this word that it is impossible to grasp the idea with our thoughts that the governor will or might fail to convene the legislature in time, or that the legislature might fail to pass a valid apportionment law in time for the election in November next. We find no difficulty whatever in grasping the idea. The like has happened before. Both the governor and the legislature have heretofore failed in duty as to apportionment laws in a marked and startling manner, as we shall see further on. But, if we are bound to presume that the governor and the legislature will perform the duty resting on each in case the act of 1885 is void and out of date, then there is no cause for interference by a court of equity by the strong arm of injunction. The court being bound not to think the unthinkable idea that those departments will fail in their duty, there is no necessity for interference by a court of equity. There must be such a necessity, or no right to such relief can be demanded. See the authorities cited further on as to this point. See, also, 10 Am. & Eng. Enc. Law, 779-782, and authorities there cited in notes, and especially note 1, beginning on page 779. Others of appellee's learned counsel urge that we must enter the field of investigation of the unconstitutionality of the act regardless of consequences; that is, as we interpret their contention, we are bound to go forward, even though we dash the people over the precipice into the bottomless pit of anarchy, and let the consequences take care of themselves. Such a doctrine is utterly inadmissible. It is an established principle of equity jurisprudence that, if there is "a probability that more wrong will be done than prevented by the injunction prayed for, it will not be granted." 10 Am. & Eng. Enc. Law, 783, and authorities cited.

It is a matter of current history and common notoriety,

as also appears by the record, that the persons who have finally consented to lend this suit their sanction and support saw clearly the perilous sea into which it was likely to lead the ship of state, and entered their solemn and patriotic protests, and yielded only such consent on a formal refusal of the executive of the state to a visiting committee requesting him to call an extra session of the legislature to pass an apportionment act. What right can the appellee have to invoke the power of this court by injunction to do what he cannot do directly, namely, to coerce the governor to exercise a discretionary power vested in him? One department of the government cannot coerce another to exercise a mere discretionary power: *Hovey v. State*, 127 Ind. 588, 27 N. E. Rep. 175. He has already refused to act. This suit, therefore, means to end the state government or to coerce the governor.

The preliminary question confronting us is very different, indeed, from that presented in either of the cases of *Parker v. State*, *supra*, or *Denney v. State*, *supra*. In each of those cases the plaintiff, in his complaint, showed that the officers were threatening to proceed under an invalid law and refusing to proceed under a valid law. Any citizen has a right to demand that public officers shall desist from proceeding under an invalid law, and proceed under a valid law, if there is such valid law, to hold elections. But that is a very different thing from a demand that no election shall be held at all, and that the wheels of government shall stop. Both of the apportionment cases above referred to proceeded upon the idea, and in fact left standing an apportionment act under which elections might be held in case the other departments of the government failed to supply a better one. This court, in *Denney v. State*, *supra*, in the principal opinion by HOWARD, J., said: "This court, in the case of *Parker v. State*, . . . expressly held that the constitutionality of the . . . act of 1885 was not before the court for adjudication, and accordingly refrained from making

any decision in regard to it. Neither has the constitutionality of the apportionment act of 1885 been questioned in the case at bar. Consequently, that act is the last, and perhaps the only, expression of the legislative will left upon the subject of apportionment, and under which senators and representatives may be chosen at the general election of 1896, unless the governor should see fit to call a special session of the legislature to pass a new apportionment law." And in the concurring opinion of HACKNEY, C. J., it was said: "The act of 1885 stands upon the statute book unchallenged. . . . Whether that act shall continue unquestioned, whether the people will follow the custom in such cases, and make their election under that law, or whether that custom will be abandoned and public officers will refuse to follow it, and thereby defeat the constitutional object to convene an assembly in 1897, depends upon the wisdom and patriotism of the people." These words in both opinions are no idle words. They are full of meaning and relative significance. They are no mere *obiter dicta*; but they express the kernel of the principle that gave the plaintiff in that case a standing in court entitling him to invoke the power of the judiciary to declare the act of 1895 unconstitutional, and gave the defendants the right to invoke the same power to declare the act of 1893 unconstitutional. These words show that this court did not mean to accord a hearing to one who invoked its power to strike down the last barrier between the people and helpless and almost hopeless anarchy, as is attempted to be done in this case. That holding was in accord with the holding in *Parker v. State*, *supra*, which was strictly followed in the *Denney* case. In the *Parker* case it was said on that point by ELLIOTT, J., in his dissenting opinion, that, "if, however, it be conceded that it is necessary to decide such questions, and to adjudge either of those acts void, then it is indispensably necessary to designate a valid law, either in the statutes or constitution, under which legislators can be chosen, for it is incon-

ceivable that no law exists providing for legislative elections." With this proposition the majority of the court did not disagree. It will thus be seen that the principle that gave the complainant a standing in each of those cases was that the relief demanded by him did not strike down all or the last and only law providing for legislative elections.

We are not legally called upon to decide whether the act of 1885 is constitutional or unconstitutional until the preliminary question first mentioned is decided in favor of the appellee, namely, has he a right to invoke that power vested in the judiciary? It was further said upon this point by ELLIOTT, J., in his concurring opinion in *Parker v. State*, that "constitutional questions will not be decided unless the party demanding their decision makes it evident that he has a right to require the court to decide them." To the same effect is *Henderson v. State*, 137 Ind. 552, 36 N. E. Rep. 257. In *Laughlin v. President, etc.*, 6 Ind., at page 228, it is said: "Nor ought the process of injunction to be applied but with the utmost caution. It is the strong arm of the court, and, to render its operation benign and useful, it should be exercised with great discretion, and only upon necessity." In no case can injunctive relief be awarded except to protect some right of the complainant: *Edwards v. Haverstick*, 47 Ind. 138; *Alexander v. Mullen*, 42 Ind. 398; *Sutherland v. Road Co.*, 19 Ind. 192; *McCowan v. Whitesides*, 31 Ind. 235. The appellee's complaint, instead of showing that he has a right to invoke the power of this court to strike down the last existing apportionment law, shows the direct contrary. That he has the right to invoke the power of this court, if, indeed, it possesses that power, to knock out the keystone of the arch that upholds the fair fabric of the state government, is self-evidently untrue. As already observed, the constitution, as originally adopted, provided that the previous apportionment law should continue for the first and second legislative elections thereafter. This discloses the intention clearly enough that there should

never be a time when there should be no apportionment law under which legislative elections might be held. Both the first and second legislatures elected thereafter failed to obey the mandate of the new constitution to pass the apportionment law. But the third legislature was elected by the people without question under the old apportionment law, which was, by the literal words of the constitution, only to last for the first and second legislative elections under the new constitution, the old law having been framed before the new constitution, and was not framed on the lines prescribed therein for apportionment acts. That third legislature was that of 1857, and it passed the first apportionment act under the new constitution; and, though that instrument commanded that body to pass one every six years, yet it failed to pass another for ten years thereafter, the next one being that of 1867. And we note that the governor also failed to convene the legislature in extra session, if that was his duty, for the purpose of passing an apportionment law, on the occasion of each one of the legislative failures above mentioned. And the legislature has failed on four other occasions to perform this duty, namely, in 1879, 1891, 1893, and in 1895, by passing unconstitutional and void acts. In view of these historical facts, it does not look as if the idea of such failures of duty on the part of the executive and legislative departments of the government were altogether unthinkable.

It is again urged that if we may not respond to the demand of the appellee to investigate the unconstitutionality of the act of 1885, because it is the only one in existence, there is no remedy against unconstitutional apportionment acts. Not by any means. We do not mean to depart in the least degree from the rigid rule laid down in *Parker v. State*, and *Denney v. State*, *supra*, but, on the contrary, we reaffirm them in their broadest terms. When the next apportionment act is passed, we will be free to inquire into its constitutionality, because the act of 1885 will stand until a

valid law takes its place. This is the theory upon which the constitution is built. While the framers of that sacred instrument, and the voters who adopted it, were all still living, they construed it to mean that the existing apportionment law, whether good or bad, in or out of date, must continue in force until a new one is enacted to take its place, and that the government shall not be brought to an untimely end because of the failure of the legislature to perform the duty enjoined upon it by the constitution. Suppose the third legislative election under the new constitution was about to take place, and that some one, fonder of curiosities and of tinkering with a loaded gun than of the safety of himself and others, had brought suit to enjoin the holding of that election, on the ground that there was no apportionment law, the legislature having failed to enact one, and the one provided in the constitution having expired by the express terms of the constitution; the courts, and especially this court wherein then sat those who had helped to make the new constitution, would have answered such demand by saying that it was no more intended by its makers that there should ever come a time under that instrument when there should be no law in existence authorizing legislative elections than that the Creator designed that in Him man should live, move and have his being without breath. The just fame of its authors would be greatly marred if it was contemplated by them that by the failure of any officer or body of officers under that constitution to discharge the trust reposed in them by the people, and perform the duty enjoined by its provisions, a time might come when we would have no law in existence authorizing legislative elections, and the people have no other security against approaching anarchy, chaos and revolution, than a mere trust in good luck, or the good will of any man or set of men. If these great men made such a rope of sand out of the constitution, their fame has been undeserved. But the contrary is true. They never in-

tended the people should have no other security against anarchy and revolution than good luck.

Our conclusion is that as the act of 1885 is the only law that has not been repealed or adjudged unconstitutional under which an election of members of the legislature can be held in November, 1896, the appellee has no right to invoke the powers of the courts to declare it unconstitutional; and that, therefore, the complaint did not state facts sufficient to constitute a cause of action; and that the superior court erred in overruling the demurrer thereto. The judgment is reversed, with instructions to sustain the demurrer to the complaint.

JORDAN, J.—I concur in the result reached in this appeal, but not in all the reasoning of the opinion of Judge McCABE. It may be conceded that the apportionment act of 1885 is replete with the evils that were condemned by this court under the decisions in the cases of *Parker v. State*, 133 Ind. 178, 32 N. E. Rep. 836, and 33 N. E. Rep. 119, and *Denney v. State*, (at this term,) 42 N. E. Rep. 929. I am of the opinion, however, that the appellee, who seemingly brought this action in the lower court in behalf of himself and other electors of the state, has not timely exercised the right to assail the validity of the statute in controversy, and for that reason, at least, his case is devoid of equity; and, under the circumstances, he is not in a condition to demand that the court shall interpose and award the extraordinary writ of injunction to prevent the appellants, who are public officers, from doing the acts of which he complains. The statute in dispute ran through an entire sexennial period, during which time it was acquiesced in by the people, and its validity was not challenged in any court; and, under its provisions, three successive general assemblies were elected by the voters of this state. It is true that, during the time this statute was in active operation, it was criticised and denounced by the public press, and

upon the stump ; yet no attempt was made to assail it in court during the running of its sexennial period, and thereby secure a judicial determination of its validity. It is a familiar maxim that equity aids the vigilant, and not those who sleep upon their rights. It promotes diligence in a suitor, and punishes his "laches," by denying his request for the relief which he might have obtained had he applied therefor in due season. I fail to recognize anything, under the circumstances in the case at bar, which will shield the appellee from the force and effect of the salutary rule to which we have referred. As stated heretofore, the great body of the state's electors seems to have accepted this statute, and biennially, for the period of six years, exercised the right to elect representatives and senators thereunder; and now, after the lapse of this period, and at a time when it is conceded by his counsel that there remains no other law under which the next general assembly can be elected, the appellee invokes the judiciary to inquire into the constitutionality of the act in question, and grant the extraordinary relief demanded, regardless of the consequences that may follow.

It is manifest, I think, that under the status occupied by the appellee and the circumstances of the case in general, this cannot be done without violating the fundamental principles of equity. It is not apparent that any special beneficial results will enure to the appellee if the statute in question should be adjudged to be invalid, while, upon the other hand, injurious ones might result to the public; hence, under such circumstances, it is evident that equitable rules do not require a court to award the relief requested by the appellee. It is true, as contended by the eminent and learned counsel for the latter, as a general proposition, that courts have nothing to do with the consequences that follow from their decisions; yet, under the state of facts in this cause, the question of the probable results that the public may sustain if a decision should be adverse to the

statute in dispute becomes a potent factor in deciding whether the relief sought by the action should be granted. Again, it may be said that if, under the existing emergency, the governor declines to convene the present general assembly in extra session, to enact an apportionment law, and thereby the electors are virtually driven to elect, under the act of 1885, members of the house of representatives and successors to the senators who were elected in 1892, it cannot, in reason, be urged that the courts ought to interpose and forbid them to exercise the right of so doing. The judgment should be reversed, and the lower court directed to sustain the demurrer to the complaint, for want of equity.

MONKS, J.—I dissent from both the reasoning and the conclusion reached in the prevailing opinion. The apportionment act of 1885, tested by the principles established in the cases of *Parker v. State*, 133 Ind. 178, 32 N. E. Rep. 836, and 33 N. E. Rep. 119, and *Denney v. State*, 42 N. E. Rep. 929, where this court held the apportionment acts of 1879, 1891, 1893 and 1895 unconstitutional, is clearly and without doubt unconstitutional and void. It is not a law, and is inoperative for any purpose. It confers no rights; it imposes no duties; it affords no protection, and is the same as if it had never been passed: *Johnson v. Comrs.*, 140 Ind., on page 156, 39 N. E. Rep. 311; *Strong v. Daniel*, 5 Ind. 348; *Sumner v. Beeler*, 50 Ind. 341; *Cooley, Const. Lim.* (6th Ed.) 222; *Black. Const. Law*, p. 64, § 37. It is not the judgment of a court that renders a statute unconstitutional, but the fact that it is in conflict with some provision of the constitution. A statute, therefore, that is repugnant to any provision of the constitution, is void before as well as after it is so adjudged. The fact that no court has ever passed upon the question does not render such statute constitutional and valid. Therefore, the apportionment act of 1885 is no more valid and binding than the apportionment acts of 1891, 1893 and 1895, which have been

adjudged unconstitutional by this court. This court has uniformly held that, when it clearly appears that a statute is repugnant to or in conflict with any provision of the constitution, it is the plain duty of the courts to declare it null and void: *Campbell v. Dwiggins*, 83 Ind. 473, 480; *Parker v. State*, 133 Ind., on page 187, 32 N. E. Rep. 836, and 33 N. E. Rep. 119; *Denney v. State*, *supra*. Indeed, it is not claimed in the prevailing opinion that the apportionment act of 1885 is constitutional, but it is not held invalid for the sole reason given that it is the only statute on that subject, and that, if held invalid, the governor may not call a special session of the general assembly, or, if he does, the general assembly may not enact a constitutional apportionment law, and anarchy may follow. In response to a suggestion of like character in *McPherson v. Blacker*, 146 U. S. 1, 13 Sup. Ct. Rep. 3, affirming 93 Mich. 1, the court, by Chief Justice FULLER, said: "It is argued that the subject-matter of the controversy is not of judicial cognizance, because it is said that all questions connected with the election of a presidential elector are political in their nature; that the court has no power to finally dispose of them, and that its decision would be subject to review by political officers and agencies, as the state board of canvassers, the legislature in joint convention and the governor, or, finally, congress. . . . The question of the validity of this act as presented to us by the record is a judicial question, and we cannot decline to exercise our jurisdiction upon the inadmissible suggestion that action might be taken by political agencies in disregard of the judgment of the highest tribunal of the state as revised by our own." This doctrine was approved by the supreme court of New Jersey in *State v. Wrightson*, 56 N. J. Law, 126, 28 Atl. Rep. 56.

It is the duty of each department of the state government to act in the discharge of all duties upon the presumption that the other departments will properly perform all duties incumbent upon them. It is only when the

action of the several departments of the state government is governed by this rule that its perpetuity and safety are assured. Any other course tends to bring confusion and anarchy. This court, therefore, should decide all questions properly presented upon the presumption that the executive and legislative departments of the state government will not neglect any duty, or fail to perform any function imposed upon them by the constitution. There is much less danger of anarchy by this course than for this court to declare an unconstitutional law valid, or decline to pass upon the question of its constitutionality, for the reason that the other departments named might fail or refuse to perform the duties imposed by the organic law. The suggestion that either the legislative or executive department of the state government might fail or refuse to perform the duties imposed by the constitution, as a reason why this court should not adjudge the apportionment act of 1885 unconstitutional, as it clearly is, or as a reason why this court should decline to pass upon that question, is certainly, in the language of Chief Justice FULLER, "inadmissible," and should not be considered by the court. To do so is an unwarranted reflection on the co-ordinate branches of the state government. In *Parker v. State*, (decided in December, 1892,) 32 N. E. Rep. 836, before the meeting of the general assembly in January, 1893, this court said: "If, at the next ensuing election, the state is without a valid law, creating senatorial and representative districts under the enumeration of 1889, the responsibility must rest with the legislature, and not the judicial department of the state government." This same argument was also considered and answered in the apportionment cases decided by the supreme courts of Michigan and Wisconsin. In *Giddings v. Blacker*, 93 Mich. 1, 52 N. W. Rep. 944, MORSE, C. J., said: "We do not care to go further, since there is a remedy in the hands of the executive and legislature. The consequences of this decision are not for us. It is our duty to

declare the law, to point out the invasion of the constitution and to forbid it." In *State v. Cunningham*, 81 Wis. 440, 51 N. W. Rep. 724, PINNEY, J., said: "No difficulty, it is believed, need be apprehended as to the result of the decision the court has felt it its imperative duty to make, and our respect for the executive of the state whose duty it is to take care that the laws are faithfully executed forbids any apprehension that he will fail in the least in meeting the present emergency, or to take such measures as in his wisdom seem best to give full effect to the constitution and the laws." In the same case, LYON, J., said: "Neither is the jurisdiction of the court affected, or the exercise thereof embarrassed, by the fact that this decision may leave the state without a valid legislative apportionment law, and hence without any law for the election of another legislature. The governor may convene the present legislature if he deems it his duty to do so, and, when so convened, there can be no doubt of its power to enact a valid legislative apportionment law." In the *Legal Tender Cases*, 12 Wall. 457, Mr. Justice STRONG, in delivering the opinion of the court, referred to the situation of the country when the acts were passed, and the "great business disarrangement, widespread distress and rank injustice" that would result if said acts were held invalid, but he added: "The consequences of which we have spoken, serious as they are, must be accepted if there is a clear incompatibility between the constitution and the legal tender acts."

The proposition that this court should hold an unconstitutional law valid, or refuse to pass upon the question of its validity, because some other department of the government might fail or refuse to perform the duties imposed upon it by the organic law, is a dangerous and vicious doctrine, and is not, I think, sustained by reason, and is clearly against the great weight of the authorities. Neither can I concur in the proposition that, the people having acted upon the apportionment act of 1885, by electing three suc-

cessive general assemblies under it, it is now too late to raise the question of its validity. The authorities cited in support of this doctrine have reference to actions to enforce private rights concerning property, and can have no application in a case like the one before us. This court, in *Deuney v. State*, (Ind. Sup.) 42 N. E. Rep. 929, said: "Neither do we think there was any estoppel here as in the case of *Vickery v. Comrs.*, 134 Ind. 554, 32 N. E. Rep. 880, to which we are referred. There the party bringing suit to enjoin the levy of the taxes to pay for bonds issued on purchase of a toll road had waited until he received the benefit of the bonds before asking the court to declare unconstitutional the law under which they were issued. Here; while there may be some question of private or personal benefit, yet the issue before the court is much broader. The action concerns the people of the state in their most enlarged and sacred relations of citizenship and government, and the case cannot be tied up with the purely private rights of any one. It is true that an action to test the constitutionality of the law, if brought at all, should have been pressed to a final determination in the first place. . . . Yet the people of the state, in their sovereign capacity, cannot, for such reason, be estopped from asking for the determination of the validity of the law under which it is now proposed they shall elect their next legislature. When the people of the state appear at this bar with such an issue, there can be no question of estoppel. The inquiry is one reaching the foundations of government." In *Parker v. State*, *supra*, this court held that the apportionment act of 1879 was unconstitutional, notwithstanding three successive general assemblies had been elected thereunder, and more than thirteen years had elapsed since its enactment. Yet it has only been eleven years since the apportionment act of 1885 was passed. Lapse of time, however, cannot, in a case like the one at bar, render an unconstitutional statute valid or secure from attack, or deprive the people of their right to question its

validity. We think the correct doctrine was declared in *State v. Wrightson*, 56 N. J. Law, on page 208, 28 Atl. Rep. 56, quoting the language of Judge COOLEY: "Acquiescence for no length of time can legalize a clear usurpation of power when the people have plainly expressed their will in the constitution and appointed judicial tribunals to enforce it." The subject of acquiescence in unconstitutional apportionment statutes, as affecting the right of an elector to have the validity of the act determined, was considered by the supreme court of New Jersey in *State v. Wrightson*, *supra*, where it was claimed that a particular method of apportionment had been acquiesced in ever since the adoption of the constitution by all parts of the state government, and by the people, and that, therefore, it was no longer subject to question. But it was held by the court that this doctrine had no application whatever in a case where it appeared that the mandates of the constitution had not been obeyed. The court said: "The constitution contains the permanent will of the people. It is paramount to the power of the legislature, and can be revoked or altered only by the power which created it. Popular government can be maintained only by upholding the constitution at all times and on all occasions as it was when it came from the hands of the people, by whose fiat it was established as the fundamental articles of government, to abide until altered by the authority which created it. To adopt the language of Chief Justice BRONSON, in *Oakley v. Aspinwall*, 3 N. Y. 568: 'There is always some plausible reason for the latitudinarian constructions which are resorted to for the purpose of acquiring power—some evil to be avoided or some good to be attained, by pushing the powers of the government beyond their legitimate boundary. It is by yielding to such influences that constitutions are gradually undermined and finally overthrown. . . . One step taken by the legislature or the judiciary in enlarging the powers of the government opens the door for another, which will be sure to fol-

low; and so the process goes on, until all respect for the fundamental law is lost, and the powers of the government are just what those in authority please to call them.' Within the domain of construction, there is room for argument and discussion—nay, even for a diversity of opinion; but when the meaning of the constitution, interpreted by its letter and in its spirit, is ascertained, extraneous considerations are of no avail. In the process of construction, long usage and practical interpretation are entitled to great weight if the language be obscure or doubtful; but such extraneous considerations cannot be allowed 'to abrogate the text' or 'fritter away its obvious sense.' I have already said that, on a construction of the words of the constitutional provision regulating this subject, fortified by the policy and institutions which prevailed in this state prior to the framing of the constitution, and a comparison of other of its provisions, the constitutional mandate requires the election of members of the general assembly by the legal voters of the counties respectively, and that the division of counties into assembly districts, and the distribution of the members among these districts for the purpose of electing such members, is in conflict with the constitutional mandate. No one can examine the legislation on this subject from 1871 to the present time, and contemplate the results, without realizing the evils which have been fostered under this system. Relief from these wrongs through the ballot-box cannot be assured, the majority in the legislature being elected under this system by a minority of the legal voters of the state. Precedent has been followed by retaliation, to be repeated from time to time as supremacy in the legislature has passed from one political party to the other. For this condition of affairs the only remedy is by a return to constitutional methods:" *State v. Wrightson*, 56 N. J. Law, 126, 214, 28 Atl. Rep. 56. It is said in *Cooley*, Const. Lim. 87, note, in criticising the action of certain courts in declaring a statute to be constitutional which

was not, "But it would have been interesting and useful if either of these learned courts had enumerated the evils that must be placed in the opposite scale when the question is whether a constitutional rule shall be disregarded, not the least of which is the encouragement of a disposition on the part of legislative bodies to set aside constitutional restrictions in the belief that if the unconstitutional law can once be put in force and large interests enlisted under it, the courts will not venture to declare it void, but will submit to the usurpation, no matter how gross and daring. We agree with the supreme court of Indiana that in construing constitutions courts have nothing to do with the argument of *ab inconvenienti*, and should not 'bend the constitution to suit the law of the hour.' *Greencastle Tp. v. Black*, 5 Ind. 557, 565, and with *BRONSON*, C. J., in what he says in *Oakley v. Aspinwall*, 3 N. Y. 547, 568."

It is now more than five months until the next general election, and ample time remains for the proper authorities to take such steps as may be deemed necessary to protect the rights of the people, and see "that the laws are faithfully executed." If, however, the election were so near at hand that such steps could not reasonably be taken, the court might properly withhold its decision until after the election was held; but in no event would the court be justified in adjudging that an unconstitutional apportionment act was valid, or in refusing to pass upon the question of its validity. To do so is to disregard the provisions of the constitution, which every officer is sworn to support. It is proper to say that the quotation made in the prevailing opinion from the separate opinion of *ELLIOTT*, J., in *Parker v. State*, *supra*, is from that part of the opinion in which he expresses his dissent from the action of the majority in declaring the apportionment act of 1891 unconstitutional, and that the language quoted gives one of the reasons he urged why the court should not pass upon the question. The majority of the court, however, passed upon the ques-

tion, and held said act unconstitutional. The judgment should be affirmed.

JURISDICTION OF EQUITY OVER ELECTIONS.

1. **Elections for Office.**—As a general rule, a court of equity has no jurisdiction to try a contested election, or a disputed title to a public office, even though no mode of trying such a question is provided by statute, or though it is alleged that the statute authorizing the election is unconstitutional, or that the title to the office was obtained by fraud: *Colton v. Price*, 50 Ala. 424; *Beebe v. Robinson*, 52 Ala. 66, overruling *Bruner v. Bryan*, 50 Ala. 522; *Willeford v. State*, 43 Ark. 62; *Moore v. Hoisington*, 31 Ill. 243; *Delahanty v. Warner*, 75 Ill. 185; *Sheridan v. Colvin*, 78 Ill. 237; *Dickey v. Reed*, 78 Ill. 261; *Cochran v. McCleary*, 22 Iowa, 75; *Neeland v. State*, 39 Kans. 154; *State v. Duffel*, 32 La. An. 649; *Planters' Co. Assn. v. Hanes*, 52 Miss. 469; *Ex parte Wimberly*, 57 Miss. 437; *People v. Draper*, 24 Barb. (N. Y.) 265; *Tappan v. Gray*, 7 Hill, (N. Y.) 259, affirming 9 Paige Ch. 507; *Patterson v. Hubbs*, 65 N. C. 119; *Jones v. Comrs. of Granville*, 77 N. C. 280; *Hagner v. Heyberger*, 7 W. & S. (Pa.) 104; *Gilroy's Appeal*, 100 Pa. 5; *Goldsworthy v. Boyle*, 175 Pa. 246; *McAllen v. Rhodes*, 65 Tex. 348; *Kilpatrick v. Smith*, 77 Va. 347. "The extraordinary jurisdiction of a court of equity cannot be invoked to protect the right of a citizen to vote or to be voted for at an election, or his right to be a candidate for or to be elected to any office; nor can it be invoked for the purpose of restraining the holding of an election, or of directing or controlling the mode in which, or of determining the rules of law in pursuance of which, an election shall be held:" *Fletcher v. Tuttle*, 151 Ill. 41. Accordingly, equity will not enjoin the registration officers from proceeding to register voters: *Holmes v. Oldham*, 1 Hughes, (U. S.) 76; *Hardesty v. Taft*, 23 Md. 512; but see *Page v. Allen*, 58 Pa. 338; the holding of an election: *Holmes v. Oldham*, 1 Hughes, (U. S.) 76; *Jones v. Black*, 48 Ala. 540; *McKinney v. County Comrs.*, (Fla.) 3 So. Rep. 887; *McKinney v. County Comrs.*, (Fla.) 4 So. Rep. 855; *People v. Galesburg*, 48 Ill. 485; *Walton*

v. Develing, 61 Ill. 201; *Darst v. People*, 62 Ill. 306; *Harris v. Schryock*, 82 Ill. 119; *State v. Wolfenden*, 74 N. C. 103; *Smith v. McCarthy*, 56 Pa. 359; the delivery of the registration books to the election officers: *Ex parte Lumsden*, 41 S. Car. 553; the canvassing of the votes cast at an election: *Weil v. Calhoun*, 25 Fed. Rep. 865; *Willeford v. State*, 43 Ark. 62; *Ex parte Ivey*, 26 Fla. 537; *Mendenhall v. Denham*, 35 Fla. 250; *Kemp v. Ventulett*, 58 Ga. 419; *Dickey v. Reed*, 78 Ill. 261; *Peck v. Weddell*, 17 Ohio St. 271; *Lawrence v. Knight*, 1 Brewst. (Pa.) 67; the declaring of the result of an election: *Clayton v. Calhoun*, 76 Ga. 270; the certifying of the returns of an election to the officers authorized to receive them: *Alderson v. Comrs.*, 32 W. Va. 640; the delivery of the returns to the legislature: *Smith v. Myers*, 109 Ind. 1; *Fleming v. Guthrie*, 32 W. Va. 1; the issuing of a certificate of election: *Neiser v. Thomas*, 99 Mo. 224; the use of a certificate of election duly granted: *Moulton v. Reid*, 54 Ala. 320, overruling *Reid v. Moulton*, 51 Ala. 255; *Hulsemann v. Rems*, 41 Pa. 396; *Rink v. Barr*, 14 Phila. 154; *contra*, *Miller v. Lowry*, 5 Phila. 202; the issue of a commission to the person who has been declared by the proper authority to have been elected: *Beal v. Ray*, 17 Ind. 554; *Sanders v. Metcalf*, 1 Tenn. Ch. 419; or the prosecution of the contest of an election, as authorized by statute, even when the office is that of clerk of the court: *Ex parte Wimberly*, 57 Miss. 437; and if it does issue an injunction in such a case, it is void, and one who disobeys it cannot be punished for contempt: *Walton v. Develing*, 61 Ill. 201; *Dickey v. Reed*, 78 Ill. 261; *Ex parte Wimberly*, 57 Miss. 437. If, however, the act under which the election is to be held is utterly void, the secretary of state may be restrained from giving notice thereof, at the suit of the attorney general, by the prerogative writ of injunction, where that is authorized by law: *State v. Cunningham*, 81 Wis. 440; *State v. Cunningham*, 83 Wis. 90; see *Giddings v. Blacker*, 93 Mich. 1; but not elsewhere: *Fletcher v. Tuttle*, 151 Ill. 41. So, when a statute provides that an injunction may issue in aid of any suit at law, and proceedings to contest an election have begun, an injunction will be granted to restrain the issue of a certificate of election until the contest is determined: *In re Sloan*, 5 N. Mex. 590.

2. Election to Decide Public Questions.—In elections to decide certain questions, such as the removal of a county seat or the like, where the interests of taxpayers are directly involved, if it is alleged that a majority was obtained by fraudulent or illegal voting, or was fraudulently returned by the canvassers, it has been held that the proper officer may be restrained from acting in pursuance of the election: *Maxey v. Mack*, 30 Ark. 472; *Boren v. Smith*, 47 Ill. 482; *People v. Wiant*, 48 Ill. 263; *Shaw v. Hill*, 67 Ill. 455; *contra*, *Leigh v. State*, 69 Ala. 261; *Caruthers v. Harnett*, 67 Tex. 127; *Caruthers v. Slaughter*, (Tex.) 2 S. W. Rep. 526. Thus, an election for the removal of a county seat will be enjoined on the ground that it would be a waste of the public funds, when it is not authorized by law: *Solomon v. Fleming*, 34 Neb. 40; or when the petition for the election was illegal: *State v. Eggleston*, 34 Kans. 714; and the removal of the county seat will be enjoined when the election is contested on the ground of fraud: *Boren v. Smith*, 47 Ill. 482; *People v. Wiant*, 48 Ill. 263; *Krieschel v. Board of Comrs. of Snohomish Co.*, 12 Wash. 428; especially if no other mode of contest is provided: *Rice v. Smith*, 9 Iowa, 570; *Sweatt v. Faville*, 23 Iowa, 321; *contra*, *Hamilton v. Carroll*, 82 Md. 326. So, it has been held that a statute authorizing an election to determine the question of bonding a debt, which prohibits the issue of bonds without the consent of a certain number of voters, but provides no method of enforcing that provision, by implication confers an equity power to try the validity of the election; and any taxpayer may enjoin the publication of the result: *Gibson v. Board of Supervisors*, 80 Cal. 359.

3. Title to Office not Triable in Equity.—Equity cannot try the title to office in a direct proceeding; but when the question arises collaterally, it will assume jurisdiction over it and decide it. Accordingly, though it will not interfere to put a claimant in possession of his office, it will protect one already in possession from being disturbed unlawfully. Thus, an injunction will not be granted, either at the suit of a taxpayer or of a rival claimant, to restrain an officer *de facto*, though illegally elected, from entering upon the duties of his office and receiving the salary, fees and other emoluments thereof: *Colton v. Price*, 50

Ala. 424; *Beebe v. Robinson*, 52 Ala. 66, overruling *Bruner v. Bryan*, 50 Ala. 522; *McDonald v. Rehner*, 22 Fla. 198; *Stone v. Wetmore*, 42 Ga. 601; *Peet v. White*, 43 Iowa, 400; *State v. Durkee*, 12 Kans. 308; *Tappan v. Gray*, 7 Hill, (N. Y.) 259, affirming 9 Paige Ch. 507; *Morris v. Whelan*, 11 Abb. N. C. (N. Y.) 64; *Johnston v. Garside*, 65 Hun, (N. Y.) 208; *McAllen v. Rhodes*, 65 Tex. 348; nor to prevent the payment of salary to such an officer, who has discharged the duties of his office: *Burgess v. Davis*, 138 Ill. 578; *Butler v. Ellerbe*, 44 S. Car. 256; nor to restrain removal from office under color of authority: *Heffran v. Hutchins*, 160 Ill. 550; *Reeves v. Griffin*, 29 Wkly. Law Bull. (Ohio,) 281; nor to restore one who has been illegally removed: *Callan v. Board of Commissioners of Fire Dept.*, 45 La. An. 673; *Sherman v. Clark*, 4 Nev. 138; nor to prevent the appointment of his successor: *Delahanty v. Warner*, 75 Ill. 185; nor to restrain the deforcement of an office; though the term of the incumbent has expired, and the complainant has been legally elected and qualified, or though the incumbent is a mere intruder: *Markle v. Wright*, 13 Ind. 548; *Hagner v. Heyberger*, 7 W. & S. (Pa.) 104; *Updegraff v. Crans*, 47 Pa. 103; but the actual incumbent of an office, whether *de jure* or *de facto*, if duly qualified, and in office by virtue of a certificate of election issued by the proper officers, will be protected by injunction against unlawful interference with his possession thereof: *Brady v. Sweetland*, 13 Kans. 41; *Braidv. Theritt*, 17 Kans. 468; *Guillotte v. Poincy*, 41 La. An. 333; *Palmer v. Foley*, 45 How. Pr. (N. Y.) 110; *State v. Superior Court of Snohomish Co.*, (Wash.) 48 Pac. Rep. 741; as by illegally electing another in his stead: *Wheeler v. Bd. of Fire Comrs.*, 46 La. An. 731; or by removing him without authority: *Armatage v. Fisher*, 74 Hun, (N. Y.) 167. It will also sometimes interfere to protect the interests of the public; *e. g.*, when two different bodies claim to act as the common council of a city: *Kerr v. Trego*, 47 Pa. 292.

Equity—Jurisdiction—Wills—Legatee—Murder of Testator—Partition.

ELLERSON v. WESTCOTT ET AL.

(Court of Appeals of New York. January 7, 1896.)

(148 N. Y. 149, 755 ; 42 N. E. Rep. 540. Reversing 88 Hun, 389 ; 34 N. Y. Suppl. 813.)

The killing of a testator by a devisee for the purpose of realizing under a will does not render the devise void, but merely authorizes equity to deprive the devisee of the fruits of his iniquity.

Since the killing of a testator by a devisee does not render the devise void, an heir-at-law cannot, in partition, recover on proof that the devisee killed the testator, under Code Civ. Proc. N. Y. § 1537, providing that a person claiming an interest in land as heir may sue for partition notwithstanding an apparent devise to another ; but the plaintiff must prove the devise void.

Appeal from Supreme Court, General Term, Fourth Department.

Action by Catherine C. Ellerson against Elizabeth P. Westcott and others. From a judgment of the general term, (88 Hun, 389 ; 34 N. Y. Suppl. 813,) reversing an order of the special term denying plaintiff's motion to amend, defendants appeal. Reversed.

The plaintiff, claiming as one of the heirs of her brother, Munroe Westcott, who died May 9, 1891, seised of several parcels of real estate, in November, 1893, commenced this action for partition. In her complaint she alleges that she and the children of a deceased sister were the only heirs-at-law of her deceased brother. The complaint sets out a paper purporting to be the will of Munroe Westcott, bearing date April 9, 1890, and alleges that it had been admitted to probate as his will in the proper county. By this instrument the testator gives his personal property remaining after payment of his debts to his wife, Elizabeth Pope Westcott,

absolutely, and, after making certain specific devises, gives the use of all the residue of his real estate to her for her life, and the remainder, after her death, to the defendant Cora P. Ganung, for the founding and endowment of a hospital. It is alleged in the complaint that the two executors named in the will, including Elizabeth Pope Westcott, are in possession of the real and personal property left by the testator, claiming possession as such and as devisees and legatees under the alleged will. The original complaint based the right of the plaintiff to bring the action upon the averments that the will was not legally published; that the testator was incompetent to make a will; that it was procured by the fraud and undue influence of Elizabeth Pope Westcott and Cora Ganung, the executors and principal beneficiaries under the will; that it was void for uncertainty, and that its provisions were in contravention of the statute of trusts and perpetuities. The plaintiff joined as defendants, among others, the devisees and legatees under the will, and the children and heirs of her deceased sister, and demanded judgment, declaring the alleged will to be void, and that it be set aside, and that the plaintiff and her nieces, the children of her deceased sister, be adjudged to be lawful owners of the real estate left by the testator, and that partition be decreed, etc. After issue had been joined, the plaintiff made a motion at special term to amend her complaint, which motion has given rise to this appeal. The amendment sought was to permit her to allege, in substance, that the defendant Elizabeth P. Westcott, for the purpose of realizing the benefits given her by the will, caused the death of the testator by the administration of poison or by other means. The special term denied the motion, but its order was reversed by the general term, and from the order of reversal this appeal is taken.

Isaac H. Maynard, for appellants.—Plaintiff cannot be permitted to set up the cause of action embodied in the

proposed amendment: Code Civ. Proc. § 1537. The appellant, Mrs. Westcott, never having been indicted and convicted of the crime of murdering her husband, the testator, cannot be required, as she would if this amendment is allowed, to answer to a capital crime, without presentment or indictment of a grand jury, in violation of the guaranty of both the state and federal constitutions: 23 Abb. N. C. (N. Y.) 453, 454. The allegations by means of which it was attempted, by the proposed amendment, to introduce this new cause of action, are insufficient for that purpose: 23 Abb. N. C. (N. Y.) 453. If the proposed amendment is allowed, the complaint will contain causes of action which will be inconsistent with each other, and therefore the complaint would, upon its face, be demurrable: Code Civ. Proc. § 484. The proposed new cause of action, if introduced into the complaint, would render it demurrable, because it does not affect all the parties to the action: *Nichols v. Drew*, 94 N. Y. 22; *Goldberg v. Utley*, 60 N. Y. 427; *Wiles v. Suydam*, 64 N. Y. 173; *Zorn v. Zorn*, 38 Hun, (N. Y.) 67.

A. D. Wales, for respondent.—The amendment desired is literally covered by § 1537 of the Code: *Riggs v. Palmer*, 115 N. Y. 506; *Hall v. Hall*, 13 Hun, (N. Y.) 306; 81 N. Y. 130; Code Civ. Proc. §§ 1538, 1542. Section 1537 of the Code of Civil Procedure is not a limitation upon the power to bring partition actions by plaintiffs out of possession to the peculiar case provided for by this section: *Weston v. Stoddard*, 137 N. Y. 119, 127; Code Civ. Proc. §§ 1537, 1543. Under § 1537 the whole question of the will is properly involved. We are not asking to allege a new cause of action, but simply to modify the cause of action: *Hammond v. Cockle*, 2 Hun, (N. Y.) 495. The decision of the special term is erroneous: *Weston v. Stoddard*, 137 N. Y. 119; *Collins v. Collins*, 36 N. Y. S. R. 591; 131 N. Y. 648; *La Tourette v. Decker*, 45 N. Y. S. R. 78; *Hammond v. Cockle*, 2 Hun, (N. Y.) 495; *Hewlett v. Wood*, 62 N. Y. 75. The allega-

tions added by the amended complaint involve the consideration of equitable principles only. It is a general principle that a court of equity, once having jurisdiction, will dispose of all questions arising in the action and prevent a multiplicity of suits: *Beach on Mod. Eq. Juris.* § 22; *Hosford v. Merwin*, 5 Barb. (N. Y.) 51; *Scott v. Guernsey*, 60 Barb. (N. Y.) 163, 178; *Hammond v. Cockle*, 2 Hun, (N. Y.) 495; *Weston v. Stoddard*, 137 N. Y. 119, 128. The policy of the law unquestionably is to try all the issues and all possible questions of title involved in an action of partition, so that the judgment will, indeed, be a final one: *Shannon v. Pickell*, 28 N. Y. S. R. 464; *Bell v. Gittere*, 30 N. Y. S. R. 219; *Hagerty v. Andrews*, 4 Civ. Proc. Rep. 323; 94 N. Y. 195; *Weston v. Stoddard*, 137 N. Y. 119. The appellants claimed at general term that "in a civil action, where there has been no conviction of the defendant, the court would not have the right to deprive the accused of life, liberty or property." This is untenable: *Code Civil Proc.* §§ 384, 1899, 1902, 3343; *Gordon v. Hostetter*, 37 N. Y. 99, 105; *Penal Code*, § 710; *Riggs v. Palmer*, 115 N. Y. 506.

ANDREWS, C. J. (after stating the facts.)—The plaintiff and the defendants Elizabeth P. Westcott and Cora P. Ganung were never tenants in common or joint tenants of the real property sought to be partitioned. The plaintiff claims title as one of the heirs-at-law of the testator, Munroe Westcott. The record-title is by the will in the defendants named and others. If the will is given full effect, the plaintiff has no title to or interest in the land. The land, at the commencement of the action, was in the possession of the executors in their character as such, or as devisees under the will. The action of partition is given when two or more persons hold and are in possession of real property as joint tenants or tenants in common: *Code*, § 1532. The plaintiff, not being in possession, and not sustaining the

relation of tenant in common or joint tenant to the defendants who were in possession, cannot maintain an action for partition unless by reason of the exception contained in § 1537 of chap. 14, tit. 1, art. 2 of the Code, relating to actions for partition. That section is as follows: "A person claiming to be entitled as a joint tenant or a tenant in common, by reason of being an heir of a person who died holding, and in possession of, real property, may maintain an action for the partition thereof, whether he is in or out of possession, notwithstanding an apparent devise thereof to another by the decedent and possession under such devise. But in such an action the plaintiff must allege and establish that the apparent devise is void." This section is a substantial re-enactment of § 2 of chapter 238 of the Laws of 1853, entitled "An act relative to disputed wills." If the fact stated in the proposed amendment, to the effect that the defendant Elizabeth P. Westcott caused the death of the testator by poisoning or other felonious means to enable her to come into possession of the estate devised to her, would, if proved, make the devise to her void, the court had power to permit the amendment to be made, and the denial of the motion at special term, which was put on the want of power, was erroneous. If, on the other hand, conceding that the fact sought to be introduced by amendment was true, nevertheless the devise to the testator's wife was not thereby rendered void, the issue tendered could not be tried in a partition action. The plaintiff relied upon the case of *Riggs v. Palmer*, 115 N. Y. 506, 22 N. E. Rep. 188, as establishing that where a legatee or devisee under a will, to prevent a revocation or to anticipate the enjoyment of the benefit conferred, puts the testator to death, the felonious act makes the legacy or devise void. We think this contention is not justified by that case. That was an action by an heir-at-law of a testator against a devisee and legatee who had murdered the testator to obtain possession of the property given him by the will, to cancel the provisions for

his benefit, and to have it adjudged that he was not entitled to take under the will, or to share, as distributee or otherwise, in the estate of the testator; and the relief was granted. But the court did not decide that the will was void. A will may be void for many reasons. It may not have been executed with the forms required by law. It may dispose of the property upon limitations in contravention of law. The testator may, by reason of alienage or other incapacity, be incapable of making a will. The statute may interpose a prohibition against devises or bequests to certain persons or corporations, or affix limitations; and wills made in violation of the statute will be void, either in whole or partially: *Hall v. Hall*, 81 N. Y. 130. A will may be procured by fraud or undue influence, and, if this is established, the will is void, because it is not in law the act of the testator.

But the case presented by the fact sought to be introduced by the amendment to the complaint in this action does not show, or tend to show, that the will was void. It alleges neither incompetency on the part of the testator, nor any defect in the execution of the will, nor that the devise to the testator's wife was in contravention of any statute, nor that it was procured by fraud or undue influence, nor that the wife was under any incapacity to take and hold property by will. If the fact sought to be incorporated in the complaint can be established, *Riggs v. Palmer* is an authority that a court of equity will intervene, and deprive her of the benefit of the devise. It will defeat the fraud by staying her hand and enjoining her from claiming under the will. But the devise took effect on the death of the testator, and transferred the legal title and right given her by the will. The relief which may be obtained against her is equitable and injunctive. The court, in a proper action, will, by forbidding the enforcement of a legal right, prevent her from enjoying the fruits of her iniquity. It will not and cannot set aside the will. That is valid, but it will act upon facts arising subsequent to its execution, and deprive

her of the use of the property. The civil law debarred one who procured the death of another from succeeding to his estate, either as testamentary heir or by inheritance, on the ground that he was unworthy. Domat says he shall be deprived of the inheritance, (part 2, bk. 1, tit. 1, § 3,) and in the Code Napoleon (§ 627) such a person is classed among those "unworthy to succeed, and as such excluded from succession." This was one of the penalties for his misconduct. It operated to exclude him from the benefit of the devise on the principle that by his conduct he had debarred himself from claiming it.

The conclusion reached makes it unnecessary to determine the question argued whether a trial and conviction for the crime is a condition precedent to invoking the application of the doctrine of *Riggs v. Palmer* in an action to debar a devisee from taking under the will of the person whose death he is charged to have feloniously caused. It is proper to state that the issue sought to be introduced in this case was tried before the surrogate on the probate of the will, and that the answering affidavits used on the motion to amend deny in the strongest terms the charge made against the wife. The only question before us is one of statutory construction. We have no concern with the question whether it would or would not be proper to permit the trial of the issue sought to be made in an action of partition. The statute is our only guide, and, having reached the conclusion that the facts alleged, if true, did not make the will void, the statutory condition does not exist which enables the plaintiff to bring that issue into this case. It is quite true that the scope of the action of partition has been greatly enlarged by recent legislation (see *Weston v. Stoddard*, 137 N. Y. 119, 127, 33 N. E. Rep. 62;) but § 1537 excludes by necessary implication a contest in partition between a plaintiff claiming as heir and a devisee in possession, except when the "apparent devise is void;" and this is not that case. This leads to a reversal of the order of the gen-

eral term and an affirmance of the order of the special term, with costs. All concur. Ordered accordingly. .

FORFEITURE OF RIGHT OF INHERITANCE BY MURDER OF ANCESTOR.

1. **At Common Law.**—A question has recently arisen in several cases, which, in view of the cheapness of human life in the United States, and the general immunity afforded to murderers, is bound to become of great importance, viz. : whether an heir or devisee who has murdered his ancestor or testator can receive the inheritance, devise or legacy, which his crime has enabled him to acquire out of due time.

The first case in which this question arose, *Riggs v. Palmer*, 115 N. Y. 506, decided that when a beneficiary under a will, in order that he might prevent revocation of the provision in his favor, and obtain the speedy enjoyment and possession of the property, wilfully murdered the testator, he was, by reason of his crime, deprived of any interest in the estate left by his victim, and therefore was not entitled to the property, either as devisee under the will, or as heir-at-law or next of kin, basing the decision upon the maxim that no one shall take advantage of his own wrong. But this proposition was too broad to be supported, and its fallacy was clearly pointed out by GRAY, J., in his dissenting opinion, as follows (p. 519) : " I cannot find any support for the argument that the respondent's succession to the property should be avoided because of his criminal act, when the laws are silent. Public policy does not demand it, for the demands of public policy are satisfied by the proper execution of the laws and the punishment of the crime. There has been no convention between the testator and his legatee, nor is there any such contractual element in such a disposition of property by a testator, as to impose or imply conditions on the legatee. The appellants' argument practically amounts to this : That as the legatee has been guilty of a crime, by the commission of which he is placed in a position to sooner receive the benefits of the testamentary provision, his rights to the property should be forfeited, and he should be divested of his estate. To allow their argument to prevail would involve the diversion by the court of

the testator's estate into the hands of persons whom, possibly enough, for all we know, the testator might not have chosen or desired as its recipients. Practically the court is asked to make another will for the testator. The laws do not warrant this judicial action, and mere presumptions would not be strong enough to sustain it."

Accordingly, the doctrine of *Riggs v. Palmer* has been rejected in Ohio: *Deem v. Millikin*, 6 Ohio Cir. Ct. 357; in North Carolina: *Owens v. Owens*, 100 N. C. 240; in Pennsylvania: *In re Carpenter's Estate*, 170 Pa. 203; and in Nebraska, where it was at first adopted: *Shellenberger v. Ransom*, 41 Neb. 631, overruling *Shellenberger v. Ransom*, 31 Neb. 61; and has finally been disapproved by the court which enunciated it, in the principal case: *Ellerson v. Westcott*, 148 N. Y. 149, 755, reversing 88 Hun, 389. The only case which at present upholds it is *Lundy v. Lundy*, 24 Can. S. C. R. 650, reversing 21 Ont. App. 560, which reversed 24 Ont. Rep. 132; and it is now well settled that at common law, a devisee or heir who murders his testator or ancestor takes the estate which the law devolves upon him, in spite of his crime: *Holdom v. Ancient Order*, 159 Ill. 619; *e. g.*, a wife who murders her husband is entitled to her distributive share of his estate: *Cleaver v. Mutual Reserve Fund Life Assn.*, [1892] 1 Q. B. 147; and to dower in his land: *Owens v. Owens*, 100 N. C. 240; a child who murders his parent inherits his estate: *Deem v. Millikin*, 6 Ohio Cir. Ct. 357; *In re Carpenter's Estate*, 170 Pa. 203; and a parent who murders his child inherits from it: *Shellenberger v. Ransom*, 41 Neb. 631, overruling *Shellenberger v. Ransom*, 31 Neb. 61; and *a fortiori*, the fact that the heir or devisee is under an indictment for the murder of the ancestor or testator will not justify the court in refusing to pay over to him his share of the estate: *In re Fleming*, 5 App. Div. (N. Y.) 190, reversing 16 Misc. Rep. 442. But when the rights of third persons intervene, the murderer cannot profit to their injury; and it has therefore been held, that the beneficiary in a life insurance policy, who has feloniously caused the death of the assured, or the assignee of the former, cannot recover on the policy: *New York Mutual Life Ins. Co. v. Armstrong*, 117 U. S. 591, reversing 20 Blatchf. 493; though if the policy becomes part of the hus-

band's estate, the beneficiary may become entitled to it as heir: *Cleaver v. Mutual Reserve Fund Life Assn.*, [1892] 1 Q. B. 147.

2. In Equity.—*Ellerson v. Westcott*, *supra*, has introduced a new doctrine, to the effect that though the common law cannot deprive the murderer of the fruits of his crime, equity can and will do it. This view is supported by Mr. James Barr Ames, of the Harvard Law School, with his usual learning and ability, in a recent number of the *American Law Register and Review*, (April, 1897,) 36 Am. L. Reg. & Rev. N. S. 225. The gist of his argument consists in the last few lines, where he says: "It is much to be regretted that counsel did not invoke, and that the courts of Nebraska, North Carolina, Ohio and Pennsylvania did not apply in the cases recently before them, the sound principle of equity, that a murderer or other wrongdoer shall not enrich himself by his iniquity at the expense of an innocent person."

This, however, assumes two things: First, that an innocent person is injured; and second, that equity has the power to interfere. Now, in the first place, there can be no one injured except the ancestor or testator; for until he is dead, no one else has any rights in his estate; and, therefore, when the heir or devisee succeeds, by operation of law, to that estate, no other possible successor, no matter what his expectations may have been, has been injured. Further, the testator suffers no injury to his estate; for that remains in him up to the moment of his death. There is, therefore, no one who has any standing in court to interrupt the devolution of the estate on the murderer, even supposing that the court had the power to interpose, except, perhaps, where the devisee would not be the heir.

In the second place, equity has no power to interfere and change the course of descent. The maxim that equity follows the law is certainly as applicable to such a case as any other doctrine; and further, to prevent the heir from inheriting, no matter for what reason, is to declare a forfeiture of his estate, which neither law or equity has power to do. It follows, then, that however repugnant the conclusion may be to our moral sense, the courts have no power to interfere in such cases, except when the devisee would not be the heir or next of kin; and even in the latter case the legality of excluding him, in the teeth

of the statute, is more than questionable. The remedy for this state of things must be administered by the legislature, not by the courts; and any attempt on their part to administer it is a sheer usurpation.

Administration—Executor—Retainer—Debt—Surety—Delay.

In re GILES.

JONES *v.* PENNEFATHER.

(Supreme Court of Judicature, Chancery Division. KEKEWICH, J. February 12, 1896.)

([1896] 1 Ch. 956.)

In an administration action an executor does not lose his right of retainer merely by reason of delay—such as not claiming his right until after the chief clerk has made his certificate under the judgment—or by the fact of his having paid the assets into court or to a receiver, provided the delay can be satisfactorily explained, and there are assets against which he can exercise his right.

The right of indemnity belonging to an executor who is surety for an unpaid debt of his testator creates an equitable debt in respect of which he may exercise the right of retainer.

In re Harrison, 32 Ch. D. 395, considered.

In March, 1881, the testator, Thomas Giles, was indebted to his bankers in the sum of £1,000, and, with the defendant, Colonel Nicholas Pennefather, gave them a joint promissory note for the amount and interest, Pennefather joining as surety only. No part of the £1,000 was ever paid either by the testator or Pennefather.

The testator died in 1892 insolvent, and thereupon this creditors' action for administration was brought against his executors, of whom the defendant Pennefather was one. On November 21, 1892, the usual judgment for adminis-

tration was pronounced, and on January 23, 1893, a receiver was appointed. The executors paid into court in the action, or to the receiver, various sums arising chiefly from the sale of the testator's farming stock, and they have no assets now in their hands.

In July, 1895, the chief clerk made his certificate allowing in full, amongst other debts, a large debt due from the testator to his bankers, including the £1,000, the subject of the promissory note, with interest.

The testator's bankers finding his assets insufficient for payment in full of the debt due on the promissory note applied for payment to the defendant Pennefather, who thereupon, in November, 1895, took out a summons asking that he might be at liberty to come in and assert his claim for the amount, notwithstanding the time limited for entering claims had expired; and that he might be at liberty to exercise his right of retainer, as one of the executors of the testator, in respect thereof.

On this summons coming on before the chief clerk he allowed the applicant to prove, and ordered £1,000, part of the funds in court in the action, to be carried over to an indemnity account for the benefit of the applicant, thus recognizing his right to recoup himself in full any amount which he might be called upon to pay under the promissory note.

The plaintiff, on behalf of himself and the other creditors of the testator, objected to the chief clerk's order; and thereupon the summons, together with the further consideration of the action, was adjourned into court, and now came on for hearing.

In an affidavit in support of the summons the defendant Pennefather stated that he entered into the promissory note simply as surety; and he explained, as reasons for his not having made his claim before, that he thought it unnecessary to do so, inasmuch as the bankers' claim had already been allowed by the chief clerk, and also that his rights as

an executor did not require any special claim to be made by him; and he asked that he might be at liberty either to retain the amount due under the promissory note, or that a sufficient amount might be retained out of the funds in court to indemnify him against the bankers' claim. It appeared that there were, either in court or in the hands of the receiver, legal assets of the testator more than sufficient to satisfy the applicant's claim.

Warrington, Q. C., and Sebastian, for the applicant, the defendant Pennefather.—The defendant claims that, as executor, he can exercise his right of retainer for the debt which he has been called upon to pay as surety for the testator. His right, according to the old and well-settled authorities, is really one of indemnity against the debt he is required to pay: *Nisbet v. Smith*, 2 Bro. C. C. 579, 582; *Ferguson v. Gibson*, 14 L. R. Eq. 379, 386. The moment the testator died the defendant, as surety, had the right to insist upon the executors paying the debt out of the assets. Being himself an executor he had the executor's ordinary right of retainer in respect of the debt, and that right was not lost by payment of the assets into court or to a receiver: *Chissum v. Dewes*, 5 Russ. 29; *Richmond v. White*, 12 Ch. D. 361.

In re Harrison, 32 Ch. D. 395, will probably be cited against us, and the circumstances in both cases are no doubt very similar; but the question of the right of the executor-surety to an indemnity was not argued, and neither *Nisbet v. Smith*, 2 Bro. C. C. 579, 582, nor *Ferguson v. Gibson*, 14 L. R. Eq. 379, 386, were cited. No allusion was made by either counsel or judge to the right of a surety to come into equity to be released from his obligation. That case, therefore, cannot be treated as an authority covering the present. We rely upon *Nisbet v. Smith*, 2 Bro. C. C. 579, 582, and *Ferguson v. Gibson*, 14 L. R. Eq. 379, 386, as the authorities which govern this case.

Renshaw, Q. C., and *Waggett*, for the plaintiff, representing the general body of creditors.—We do not dispute the law as to an executor's general right of retainer for his debt, but our contention is that in the present case the applicant is too late in claiming his right. This case is really covered by *Player v. Foxhall*, 1 Russ. 538, where, as here, the accounting party not having set up his right of retainer in due time was held to have lost his right. That case was approved of by BACON, V. C., in *Ex parte Campbell*, 16 Ch. D. 198, 200. Here, before the defendant set up any claim to retain, the chief clerk had worked out the judgment, and moreover a receiver had been appointed; and it is settled by *In re Jones*, 31 Ch. D. 440, and other cases, that after a receiver has been appointed no retainer can be claimed by an executor out of money paid to that receiver. In *Ferguson v. Gibson*, 14 L. R. Eq. 379, 386, no receiver was appointed. Again, we do not dispute the right of an executor-surety to come to this court to be relieved from his liability; but then the executor-surety must have paid the debt. The case comes precisely within *In re Harrison*, 32 Ch. D. 395, in which PEARSON, J., delivered a considered judgment. There it was held that the executor-surety's right of retainer could only be exercised against assets coming into his hands as executor, and only in respect of the debt actually paid by him as surety. So here, the defendant had not established his debt at the time he had assets in his hands and might have exercised his right of retainer. An executor cannot retain for a mere liability. He can only retain a legal debt, and out of legal assets; the debt must be legal and not merely inchoate: *In re Orme*, 50 L. T. N. S. 51. In considering whether the right exists, you must first look at the time when the liability ripens into a legal debt, and, secondly, see whether at that time there are any legal assets. *In re Harrison*, 32 Ch. D. 395, is accepted as an authority both in *Williams on Executors*, 9th ed. pp. 893-4; and *Seton on Judgments*, 5th ed. p. 1286.

(KEKEWICH, J.—This case may very well be decided against you, and yet *In re Harrison*, 32 Ch. D. 395, remain unaffected by my decision.)

KEKEWICH, J., after stating the nature of the summons, proceeded :—The general law, no doubt, is that any person claiming to be a creditor is allowed to come in and prove on reasonable terms at any time so long as there is anything against which his proof can usefully be established. Cases can be found in which a creditor has been allowed to come in and prove his claim, not only after further consideration, but even after second further consideration. He may come in on reasonable terms, that he shall not disturb any former dividend, and as to costs and other matters. As against the application of that rule in this particular case, *Player v. Foxhall*, 1 Russ. 538, is cited. BACON, V. C., commented on that case in *Ex parte Campbell*, 16 Ch. D. 198, 200, and then, speaking of the case before him, he says this : “This is a plain, straightforward case. The executor’s right is one which, like any other, may be lost, forfeited or released. But I cannot entertain any doubt that, under an order that the estate shall be applied in payment of debts in a due course of administration, the executor’s right to retain is preserved.” In that case the question was as to the right of retainer apart from proof. In other words, the right of retainer or of proof may be lost, forfeited or released ; and the learned judge pointed out that in *Player v. Foxhall*, 1 Russ. 538, the claim to retain had been made too late, and that under the circumstances he had lost his right. I should decide the same here if I were satisfied that the right had been lost, forfeited or released ; but I see nothing of the kind. The explanation of the applicant’s delay is perfectly simple. The bankers proved for the full amount due to them ; the estate has not been distributed, and it may turn out that they will be paid in full, and so have no claim against the surety ; therefore

there is not the slightest difficulty in admitting the right of proof.

Then comes the question as to the right of retainer. Colonel Pennefather is an executor, and he claims to retain in that character if he has got a present debt. The question is, Has he got a present debt? It was said by KAY, J., in somewhat similar circumstances, in *In re Orme*, 50 L. T. N. S. 51, that it was necessary to see whether the administrator of the intestate in that case—the administrator having been surety for the intestate—had to pay the debt, and he directed that the application should stand over in order that there might be an inquiry whether he had paid; but it would be absurd to do that here. As a matter of fact, Colonel Pennefather, who could not originally have been called upon to pay immediately, would now be at once called upon to pay. The assets are in court. The bankers knew he had a right of proof in this action, and if I ordered this application to stand over on that ground the application would be renewed to-morrow.

But then it is said that Colonel Pennefather has no right to retain until he has established his debt; and for that proposition the plaintiff relies on a decision by PEARSON, J.: *In re Harrison*, 32 Ch. D. 395. The settled law is accurately stated in two authorities—by Lord THURLOW in *Nisbet v. Smith*, 2 Bro. C. C. 579, and by WICKENS, V. C., in *Ferguson v. Gibson*, 14 L. R. Eq. 379. Did PEARSON, J., overrule those cases? Of course he did not. Did he differ from them? Nothing of the kind. In the first place, it was said that neither of those cases was cited in the case before PEARSON, J., and certainly the arguments in that case did not go into that particular point, and PEARSON, J., did not touch it. What he directed his mind to was this, that nothing was due to the executor before he was called upon to pay. That is perfectly true. There was no debt in that sense. As WICKENS, V. C., says, it is a right to indemnity, a right which creates an equitable debt, but not a specialty

debt. PEARSON, J., was perfectly accurate in saying that nothing was due to the executor, and then he devotes his mind to the question whether there could be any right of retainer, seeing that there were no assets—no moneys in his hands—at the time the debt matured. The learned judge says, 32 Ch. D. 397: "At the time he paid the sum there was no money in his hands. No money came to his hands which he could possibly retain. I hold, therefore, in respect of that debt, that he had no right of retainer."

Whatever may be the value of *In re Harrison*, *Id.* 395, it is entirely unaffected by anything I say on this occasion. It is a considered decision of a very eminent and careful judge, and it is enough to say that it does not affect the point I am now deciding. In my opinion, Colonel Pennefather has this equitable debt subsisting, no doubt not yet converted into a debt of money which has become actually due simply by paying, but which may become so converted; against that debt he is entitled to be indemnified, and the proper result is to work out the indemnity by providing for payment of the debt to the bank in full, and then the rest of the estate will be distributed among the creditors *pro rata*.

There will accordingly be a declaration that Colonel Pennefather's claim to retain is to be allowed.

There will be one order on the summons and on the further consideration, and the cost of all parties will be costs in the action.

RETAINER BY PERSONAL REPRESENTATIVES OF DECEASED.

1. **Right of Retainer for Debt.**—It was formerly a general rule of equity, enforced alike by courts of chancery and probate, that an executor or administrator to whom a debt was due from his testator or intestate might retain it out of the assets in his hands, in preference to all other creditors of equal degree. This remedy is generally held to arise from the incongruity of compelling the executor or administrator to sue himself, or be post-

poned to other creditors of the same degree: *Cock v. Cross*, 1 Freem. 49; *Spicer v. James*, 2 My. & K. 387; *Thompson v. Cooper*, 1 Coll. Ch. 81; *Hill v. Walker*, 4 K. & J. 166; *Nunn v. Barlow*, 1 Sim. & Stu. 588; *Wildes v. Dudlow*, 19 L. R. Eq. 198; *Page v. Lloyd*, 5 Pet. 304; *Knight v. Godbolt*, 7 Ala. 304; *Milam v. Ragland*, 19 Ala. 85; *Saunders v. Saunders*, 2 Litt. (Ky.) 314; *Young v. Wickliffe*, 7 Dana, (Ky.) 447; *Fort v. Battle*, 13 Sm. & M. (Miss.) 133; *Dolman v. Cook*, 14 N. J. Eq. 56; *Personette v. Personette*, 35 N. J. Eq. 472; *Stephens v. Harris*, 6 Ired. Eq. (N. C.) 57; *Perkins v. Se Ipsam*, 11 R. L. 270; *Evans v. Evans*, 1 Desaus. Ch. (S. Car.) 515; *Sebring v. Keith*, 2 Hill, (S. Car.) 340; *Partee v. Caughran*, 9 Yerg. (Tenn.) 460; *Harrison v. Henderson*, 7 Heisk. (Tenn.) 315; *Smith v. Watkins*, 8 Humph. (Tenn.) 331; and on the same principle it has been held in Maryland that the statute of limitations will not run against the claim of the representative against his decedent's estate, until he is discharged: *State v. Reigart*, 1 Gill, (Md.) 1. This right still exists in England: *In re Rownson*, 29 Ch. D. 358; *In re M'Myn*, 33 Ch. D. 575; *In re May*, 45 Ch. D. 499; *Laver v. Botham*, [1895] 1 Q. B. 59; *In re Beeman*, [1895] W. N. 151: and has not been either abrogated or enlarged by the act abolishing the distinction between specialty and simple contract debts: *Crowder v. Stewart*, 16 Ch. D. 368; *Wilson v. Coxwell*, 23 Ch. D. 764; nor by the tenth section of the Judicature Act of 1875; for the right of retainer does not make the executor or administrator a secured creditor: *Lee v. Nuttall*, 12 Ch. D. 61; but it has been expressly abolished by statute in some of the United States: *Willey v. Thompson*, 9 Metc. (Mass.) 329; *Newell v. West*, 149 Mass. 520; *Buckley v. Buckley*, 157 Mass. 536; *In re Jones' Estate*, 2 Misc. Rep. (N. Y.) 221; and in most of the others, the enactment of statutes requiring the presentation and allowance of claims against a decedent's estate necessarily preclude its exercise: *In re Hildebrandt's Estate*, 92 Cal. 433; *In re Succession of Rogers*, 41 La. An. 400; *Nelson v. Russell*, 15 Mo. 356; *Clancey v. Clancey*, (N. Mex.) 37 Pac. Rep. 1105; *Williams v. Purdy*, 6 Paige Ch. (N. Y.) 166; *Cann v. Cann*, 40 W. Va. 138; so that if the claim be not duly presented, it cannot be prosecuted on the audit of the account: *Riley v. McInlear's Estate*, 61 Vt. 254. Where no

such statutes exist, however, the right of retainer is still in force: *Personette v. Personette*, 35 N. J. Eq. 472; *Terhune v. Oldis*, 44 N. J. Eq. 146. It will not be defeated by the fact that the debt is barred by the statute of limitations during the testator's lifetime, if the period of presumption of payment has not elapsed: *Stahlschmidt v. Lett*, 1 Sm. & Giff. 415; *Hill v. Walker*, 4 K. & J. 166; *Coombs v. Coombs*, 1 L. R. P. & D. 288; *In re Rowson*, 29 Ch. D. 358; *Knight v. Godbolt*, 7 Ala. 304; see *State v. Reigart*, 1 Gill, (Md.) 1; but see *contra*, *Rogers v. Rogers*, 3 Wend. (N. Y.) 503; or that the assets out of which the representative seeks to retain have come to his hands after a decree for an account in a creditor's suit for the administration of assets: *Nunn v. Barlow*, 1 Sim. & Stu. 588. But when the debt is barred by the statute, the court will not order a fund to be paid to the executor or administrator merely in order to enable him to exercise his right of retainer thereout: *Trevor v. Hutchins*, [1896] 1 Ch. 844; and if the personal assets are insufficient to pay debts, the representative has no preference over other creditors, and the heir may plead the statute of limitations to his claim: *Payne v. Pusey*, 8 Bush, (Ky.) 564. Further, where the right of retainer is abolished, either expressly or by implication, the claim will be barred by the statute: *Treat v. Fortune*, 2 Bradf. Surr. (N. Y.) 116; but see *McLaughlin v. Newton*, 53 N. H. 531.

2. What Representatives may Retain.—The right of retainer extends not only to ordinary executors and administrators, but also to an executor of an executor, who may retain either for his own debt or for a debt due the deceased executor: *Hopton v. Dryden*, Prec. Ch. 180; if the latter asserted his right during his lifetime: *In re Compton*, 30 Ch. D. 15; but not otherwise: *Burge v. Brutton*, 2 Hare, 373; to an administrator *durante minore etate*, who may retain for a debt due the infant administrator, as well as for his own debt: *Roskelley v. Godolphin*, Raym. 483; *Franks v. Cooper*, 4 Ves. 763; and to an administrator *de bonis non*, and the executor of an administrator: *Weeks v. Gore*, 3 P. Wms. 184. So, a husband who is executor may retain for a debt contracted by the testator with the wife before marriage: *Prince v. Rowson*, 1 Mod. 208; but see *Prince v.*

Rowson, 2 Mod. 51. An executor *de son tort*, however, cannot retain, though the debt is of a superior degree to those of other creditors, and though the rightful executor has assented to the retainer: Ireland *v.* Coulter, Cro. Eliz. 630; Alexander *v.* Lane, Yelv. 137; Curtis *v.* Vernon, 3 T. R. 587; Prince *v.* Rowson, 2 Mod. 51; Glenn *v.* Smith, 2 Gill & J. (Md.) 493; Carey *v.* Guillow, 105 Mass. 18; Brown *v.* Leavitt, 26 N. H. 493; Turner *v.* Child, 1 Dev. (N. C.) 133; Kinard *v.* Young, 2 Rich. Eq. (S. Car.) 247; Partee *v.* Caughran, 9 Yerg. (Tenn.) 460; Shields *v.* Anderson, 3 Leigh, (Va.) 729; see Prince *v.* Rowson, 1 Mod. 208. But if he subsequently obtain administration, the retainer is good, though a suit brought against him to compel him to refund is pending: Shillaber *v.* Wyman, 15 Mass. 322; Hatch *v.* Proctor, 102 Mass. 351; Magner *v.* Ryan, 19 Mo. 196; Clements *v.* Swain, 2 N. H. 475; Rattoon *v.* Overacker, 8 Johns. (N. Y.) 126.

3. What Debts may be Retained.—The right of retainer extends to all debts due to the executor or administrator, whether solely or jointly with others, or as beneficiary or trustee; and in case of a joint debt he may retain for the whole: Cockroft *v.* Black, 2 P. Wms. 298; Plumer *v.* Marchant, 3 Burr. 1380; Bathurst *v.* De la Zouch, 2 Dick. Ch. 460; Franks *v.* Cooper, 4 Ves. 763; Loomes *v.* Stotherd, 1 Sim. & Stu. 458; Wildes *v.* Dudlow, 19 L. R. Eq. 198; Saunders *v.* Saunders, 2 Litt. (Ky.) 314; Williams *v.* Purdy, 6 Paige Ch. (N. Y.) 166; Hosack *v.* Rogers, 6 Paige Ch. (N. Y.) 415; Clark *v.* Clark, 8 Paige Ch. (N. Y.) 152; Chaffin *v.* Chaffin, 2 Dev. & Bat. Eq. (N. C.) 255; Stephens *v.* Harris, 6 Ired. Eq. (N. C.) 57; Gadsden *v.* Lord, 1 Desaus. Ch. (S. Car.) 208; Motte *v.* Motte, 1 Desaus. Ch. (S. Car.) 247; Evans *v.* Evans, 1 Desaus. Ch. (S. Car.) 515; Lenoir *v.* Winn, 4 Desaus. Ch. (S. Car.) 65; Harrison *v.* Henderson, 7 Heisk. (Tenn.) 315; Enders *v.* Brune, 4 Rand. (Va.) 438. Accordingly, one of three joint creditors appointed executor may retain in respect of the joint debt: Crowder *v.* Stewart, 16 Ch. D. 368; a surviving partner may retain for the firm debt: *In re Morris's Estate*, 10 L. R. Ch. 68; the administrator of a trustee may retain in respect of the trust estate: Sander *v.* Heathfield, 19 L. R. Eq. 21; and a surety for the testator may retain, though

he pays the debt after the death of the latter : *Boyd v. Brooks*, 34 Beav. 7. So, if one of two joint and several obligors make the obligee his executor, the latter may either retain, or, if he does not obtain satisfaction out of the assets, sue the survivor : *Dorchester v. Webb*, Cro. Car. 372 ; *Crosse v. Corke*, 3 Keb. 116 ; *Cock v. Cross*, 1 Freem. 49 ; see *Rawlinson v. Shaw*, 3 T. R. 557. An executor cannot, however, retain against his co-executor, though he may retain for his own debt out of a balance found to be due by him and his co-executor to the estate : *Chapman v. Turner*, 9 Mod. 268 ; *Kent v. Pickering*, 2 Keen, 1 ; and he can only retain against creditors of the same degree ; and hence a simple contract creditor cannot retain against a specialty creditor, in spite of the act abolishing the distinction between simple and specialty debts : *Wilson v. Coxwell*, 23 Ch. D. 764. Further, there must be some privity between the representative and the deceased ; and, therefore, when a creditor who has proved his debt dies, and bequeaths the debt to the representative, the latter cannot retain in respect of it : *Jones v. Evans*, 2 Ch. D. 420.

The privilege of retainer is confined to debts ; and the representative has no right to retain for a legacy or distributive share given him by will to the exclusion of other legatees or distributees : *Gadsden v. Lord*, 1 Desaus. Ch. (S. Car.) 208 ; and *a fortiori*, not to the exclusion of creditors. Similarly, he cannot retain a claim for damages for a tort : *Bond v. Green*, 1 Brownl. 75 ; *Plumer v. Marchant*, 3 Burr. 1380 ; though a wife may retain for damages caused by the breach of a marriage covenant by a testator who appoints her his executrix : *Loane v. Casey*, 2 W. Bl. 965 ; see *Thompson v. Thompson*, 9 Price, 464.

4. Out of what Property Retainer is Allowed.—The executor or administrator may retain out of the personal estate, whether paid to him personally, or paid into court to await the settlement of a dispute : *Richmond v. White*, 12 Ch. D. 361, reversing 10 Ch. D. 727 ; and out of equitable assets, though in such a case only the proportionate amount of his claim to the whole indebtedness of the decedent : *Baily v. Ploughman*, Mos. 95 ; *Chambers v. Harvest*, Mos. 123 ; *Hall v. Kendall*, Mos. 328 ;

Carr v. Lowe, 7 Heisk. (Tenn.) 84; but not out of real estate: *Walters v. Walters*, 18 Ch. D. 182; and when the heir is sued on a deficiency of personal assets, he may plead the statute of limitations to the claim retained: *Payne v. Pusey*, 8 Bush. (Ky.) 564. The representative cannot retain out of moneys paid into the hands of the receiver appointed in an administration suit: *Richmond v. White*, 12 Ch. D. 361, reversing 10 Ch. D. 727; *In re Birt*, 22 Ch. D. 604; *In re Jones*, 31 Ch. D. 440; but he can retain out of the estate of a bankrupt or insolvent, in respect of a debt already due, though in case of bankruptcy only for the compounded debt and interest: *In re Orpen*, 16 Ch. D. 202; *In re May*, 45 Ch. D. 499; and may prove as a creditor for a claim due *in futuro*: *In re Beeman*, [1895] W. N. 151. So, the representative of a deceased pauper can retain his debt before satisfying the claim of the poor authorities for maintenance: *Laver v. Botham*, [1895] 1 Q. B. 59.

5. Extinguishment of Right of Retainer.—Where the right of retainer exists the receipt of assets applicable to the claim of the representative, and sufficient to satisfy it, will extinguish it, as a general rule; for it will be presumed that he retained his debt: *Rawlinson v. Shaw*, 3 T. R. 557; *Kimball v. Moody*, 27 Ala. 130; *Glenn v. Glenn*, 41 Ala. 571; *Chaffin v. Hanes*, 4 Dev. (N. C.) 103; *Sebring v. Keith*, 2 Hill, (S. Car.) 340; (but see *Lowe v. Peskett*, 16 C. B. 500;) but where that right has been abolished, the receipt of assets does not extinguish the debt: *Deans v. Wilcoxon*, 25 Fla. 980; *Hall v. Pratt*, 5 Ohio, 72. The proof of the debt in bankruptcy or insolvency proceedings waives the right of retainer: *Stammers v. Elliott*, 3 L. R. Ch. 195; but the institution of an administration suit by an executor on behalf of himself and all other creditors, and submitting to an account, will not have that effect: *Ex parte Campbell*, 16 Ch. D. 198; and the right is not lost by the payment into court in a creditor's suit of money received on account of assets of the deceased, and will prevail against the plaintiff's right to have the costs of suit satisfied: *Chissum v. Dewes*, 5 Russ. 29; *Tipping v. Power*, 1 Hare, 405; *Hall v. MacDonald*, 14 Sim. 1. Further, the right of retainer being an equitable one, it will not be allowed when other equities supervene. If the representative

is largely indebted to the estate of the testator, he will not be allowed to retain for his debt, but will be compelled to set it off against his indebtedness: *Terhune v. Oldis*, 44 N. J. Eq. 146; if he has injured other creditors, *e. g.*, by paying debts out of their proper order, he can only retain the due proportion of his debt: *Lenoir v. Winn*, 4 Desaus. Ch. (S. Car.) 65; and if he has committed a *devastavit*, *e. g.*, by paying the insolvent maker of a note, payable to himself, on which the intestate was surety, a claim held by him against the intestate, more than sufficient to satisfy the note, he cannot retain at all: *Redman v. Turner*, 65 N. C. 445. Further, retainer will not be allowed when contrary to the intent of the testator, *e. g.*, in case of an estate devised to pay debts, generally or specifically: *Bain v. Sadler*, 12 L. R. Eq. 570.

Fraud—Corporations—Promoters—Profits—Recovery.

WOODBURY HEIGHTS LAND CO. v. LOUDENSLAGER.

(Court of Chancery of New Jersey. PITNEY, V. C. August 20, 1896.)

(35 Atl. Rep. 436.)

One who engages with the owner of a tract of land in organizing a corporation to purchase the land by procuring subscribers, frames the prospectus, and becomes one of the first subscribers, is a promoter of the corporation.

Defendant joined with the owner of a tract of land in procuring options of doubtful validity on adjoining tracts, and then organized a corporation, of which he became president, to purchase the land at an advanced price, under an agreement with his co-promoter alone that he was to receive part of the profits thus to be realized. He then procured deeds to himself of all the land for an actual consideration of \$66,223, recited in the deeds as \$80,000, and conveyed to the corporation for \$60,000 and 400 shares of stock. He distributed the stock *pro rata* among the stockholders and kept the profits. No part of the money paid the

vendors of the land belonged to the defendant or his co-promoter, but all was furnished by the corporation. *Held*, that the corporation was entitled to recover the profits so withheld.

Bill by the Woodbury Heights Land Company against Henry C. Loudenslager. Decree for complainant.

The bill was filed by a corporation against one of its former officers for an account and recovery of profits realized by him, as was alleged, in the purchase of certain lands for the company while he was president. The bill alleged that in the year 1889 the defendant procured options of purchase of several tracts of land lying together in Gloucester county, and making a compact body, with the view and for the purpose of forming and incorporating a land company to purchase the same at a price much above the option price, and making a large profit from the transaction, and that in furtherance of that scheme he prepared and procured subscribers to a prospectus as follows: "Prospectus for the forming of a syndicate to purchase a tract of land along the line of the West Jersey Railroad, between Woodbury and Winonah, Gloucester county, New Jersey, for the purpose of improving the same, and laying out in building lots and offering the same for sale. This tract of land comprises about four hundred acres, at the price of two hundred dollars per acre. The West Jersey Railroad Company runs through the centre of the tract, and the officials have consented to build a station for the benefit of the company. The main water main of the Woodbury Waterworks runs through the tract, which can easily be used for the benefit of the purchasers of lots. The tract is high land, and commands a fine view of the surrounding country, and is one of the finest locations for a town within fifteen miles of the city of Philadelphia. The capital required is about eighty thousand dollars; about one-half of this amount to be raised in cash by stock subscriptions, and the balance to be raised by mortgage. We, the subscribers, agree to pay the sums set opposite our names as subscribed by us upon the

organization of the company;" that the defendant himself subscribed to the same for \$2,500, but concealed at all times from his co-subscribers the fact that he expected to make a profit in the transaction; that, having procured about \$40,000 to be subscribed by about forty different subscribers, he on the 17th of March, 1890, procured the organization of the company, (the complainant herein,) himself being one of the corporators named in the certificate of incorporation, and upon its organization became one of its directors, and president of the board; that afterwards the said sums so subscribed were paid into the treasury of the corporation by the subscribers; that the defendant procured to be conveyed to himself, individually, six several parcels of land by six several owners, namely, by Joseph B. Roe, April 14, 1890, two tracts, containing together about 114 acres; by the executors of Susan Roe, deceased, April 15, 14 acres; by John H. Dilks, 71 acres; by Ann Reeves and others, 21 acres; by West Jessup, 114 acres; and by Caleb C. Pancoast, 80 acres,—all on the 16th of April—and on the same day conveyed the several tracts of land, or so much of them as amounted to 400 acres, to the complainant, for \$80,000, (that is, \$38,900 in cash, subject to mortgages for \$41,100, and the further consideration of \$40,000 in shares of stock of the corporation,) which sum of cash and shares of stock were paid and delivered to the defendant in entire ignorance on the part of the stockholders of the said company that defendant was making any profit in the transaction, when in fact the sum so paid in cash was much in excess of the amount actually paid by defendant to the several owners of said several tracts of land; that such excess was as much as \$20,000, but just how much was unknown to the complainant; that defendant, in the purchase of said lands, acted as the agent of complainant, and was in fact its president, and had no right to derive any profit therefrom; and the bill prayed discovery of the amount so received by defendant in excess of

the amount paid by him to the vendors of the land and a decree for its payment.

Defendant, by his answer, denied the concoction of the plan to procure options and form a company, and sell to the company, but alleged that such plan, if it existed, was formed and carried out by Joseph B. Roe, one of the grantors of one of the tracts of land, who himself procured the options mentioned in the bill, on his own account, for the purpose of making sale of his own farm to a company to be formed, and himself framed a prospectus to sell the same to a company at \$250 an acre, which project proving unsuccessful, the project set out in the bill was set on foot, but that it was not a part of the plan that the title of the land should be made to the defendant, and that the several titles were subsequently made to the defendant, instead of to the said Roe, because a specialty creditor of the said Roe threatened to enter judgment against him, the result of which would have been to excite action by other creditors of the said Roe, and embarrass the carrying out of the project, and that in that affair he acted as the agent for said Roe. He denied that he prepared the prospectus, or that he procured subscriptions thereto, except in a few instances. He denied that he concealed his interest in the affair from any of the subscribers, and alleged that it was generally known and understood among the subscribers that Dr. Roe was the holder of the options, and was to convey to the company at \$200 per acre, which was an advance over the option price. He denied that he procured the organization of the company, except that he joined with the other corporators in the certificate of its incorporation. He admitted the payment of the subscription and his election as president, which he says was unsought by him and against his will. He alleged that the amount paid to him in cash was only about \$30,000; the balance, of about \$9,000, being paid by the complainant directly to one of Roe's creditors; that the \$30,000 paid to the defendant was used in paying the several vendors other

than Dr. Roe, and the debts of Roe, and the balance was paid to Roe, except that Roe allowed defendant one-half the profits made by him upon the options from the other vendors; that this allowance was in pursuance of an agreement made between Roe and himself when Roe first undertook to make a market for his land; and that he divided the four hundred shares of stock issued to him in part payment of the conveyance among all the subscribers ratably, so that each received two shares of \$100 each, for each \$100 paid by him.

D. J. Pancoast and Howard M. Cooper, for complainant.
M. P. & S. H. Grey, for defendant.

PITNEY, V. C. (after stating the facts.)—There is little or no dispute as to the facts of the case. In 1889 Dr. Joseph B. Roe was the owner of a farm of about two hundred and thirty-five acres, lying about two miles southerly from Woodbury, Gloucester county, and on or near the line of the railway. It was heavily mortgaged, and the doctor was otherwise financially embarrassed. In this condition he devised a scheme whereby he might make an advantageous sale of a portion of his farm, in connection with some of his neighbors' adjoining farms, to some institution which needed such a tract, or to a land company which would develop and prepare it for market, at retail, for villa sites. With that view he approached his neighboring owners, Messrs. West Jessup, Caleb C. Pancoast and John H. Dilks, who controlled about two hundred and sixty acres of land, and procured from each of them written options to purchase their farms at certain prices, averaging considerably less than \$200 per acre. The form and precise character of these option papers is not shown. None of them are produced, though complainant seems to have used every reasonable means to obtain and procure them. It is fairly to be inferred that the options were at first merely verbal, and it is clear enough that

nothing was at any time paid for them, and no obligation imposed upon Dr. Roe to purchase. They were one-sided contracts—options, pure and simple. In this situation, and, as I infer, before all the options were actually secured, Dr. Roe employed a Mr. Long to try to get subscriptions to a stock company to take these lands at \$250 per acre. This attempt failed. He then applied to the defendant, who was then clerk of the county of Gloucester, and had recently launched, with apparent success, a land company in the neighborhood, acting as its president and manager. Defendant arranged with Dr. Roe to assist him in securing the land options, and promoting and organizing a land company to purchase the lands, upon the terms of having one-half the profits that should be realized from the sale of the lands held under option at a price greater than that paid to the owners. In pursuance of this arrangement defendant wrote out the several options, and assisted Dr. Roe in making the bargain in one or two instances. The defendant then drafted the paper called the "Prospectus," which was engrossed in duplicate and circulated for subscriptions of stock. He was himself one of the first group to subscribe, and did subscribe \$2,500 to the stock. He also personally solicited and obtained subscriptions in a few instances, and generally, in casual conversation, as opportunity offered, recommended the enterprise. When \$40,000 had been subscribed, he, on March 15, 1890, joined with six other subscribers (viz., Dr. Joseph B. Roe, Isaac Moffett, John Cooper, David J. Pancoast, J. Alfred Bodine and William N. Moland) in organizing the corporation; and at a meeting of the subscribers on the same day he acted as chairman, and was elected one of the directors, with the other six named, and on March 20, at a meeting of the board of directors, was elected its president. Calls were then issued for payments on the subscriptions, and were apparently responded to promptly, the subscribers being of undoubted pecuniary responsibility. At the first meeting of directors,

March 20, after the officers were elected, and a call for payments of stock subscriptions was directed, the following resolution was adopted: "The vice-president and secretary were authorized to enter into an agreement, in the name of the company, with Henry C. Loudenslager, for the purchase of the proposed tract of about four hundred acres, at the price of \$200 per acre, to be paid as follows: The land to be purchased subject to mortgage debts of \$40,000 or more, and the balance in cash. The president and manager were authorized to proceed with the purchase and securing of title to the land, and engage an engineer and such other help as may be needed, and proceed with the survey of the land and laying out the same, or a portion of it, for market, as building lots." In the record of this resolution in the book of minutes the word "vice" is interlined before the word "president," and the words "Henry C. Loudenslager" are written over an erasure. No explanation was made of these alterations. The stated secretary was George E. Pierson, but he does not appear to have been present at the meeting in question, as the minute is signed "Joseph B. Roe, Secretary pro tem." The first pages of the minute book, including that in question, were evidently written up all at one time, and immediately after the certificate of incorporation and the by-laws, so that it is very plain that the minute of March 20 was written in the book by Mr. Pierson from a loose slip, which was probably in the handwriting of Dr. Roe. At that date—March 20—defendant did not hold the title to any land contemplated to be sold. In pursuance of this resolution a formal contract in writing was prepared and entered into between the complainant corporation, by its vice-president and the defendant, dated April 10, 1890, whereby, in consideration of \$200 per acre, and \$40,000 in shares of stock of the company, defendant agreed to convey to complainant a tract of land containing 399 acres and 99-100 of an acre, described by metes and bounds, contained in fourteen courses, evidently the result

of a new and independent survey. At this date he held title to no part of the land. On April 14, 1890, Dr. Roe conveyed to the defendant about one hundred and fourteen acres of land, for the expressed consideration of \$23,000, and defendant executed a declaration of trust as follows: "Declaration of Trust Made by Henry C. Loudenslager. To All to Whom it May Concern: Whereas, Joseph B. Roe and wife have this 14th day of April, A. D. 1890, conveyed to me two certain tracts of land in Deptford township, Gloucester county, New Jersey, for the consideration named in said deed of twenty-three thousand dollars: Now, know ye, that I, Henry C. Loudenslager, declare that I hold title to said land for the benefit of the Woodbury Heights Land Company, a corporation of the state of New Jersey, and the consideration named in said deed is to be paid as follows by the said company: The amount of the mortgages now held by the trustees and executors of the estate of R. K. Matlock, on part of said land, for the principal sum of forty-five hundred dollars, are to remain a lien on said lands, the interest on the same to be paid in cash by the said company. The company to pay to James M. and David Roe, exrs., the sum of nine thousand dollars on account of a certain mortgage and judgments they hold against said land and said Joseph B. Roe, less any amount that may be due from said James M. and David Roe, exrs., on account of any taxes paid by said Joseph B. Roe, for their account; and, when said sum is paid, they, the said James M. and David Roe, executors, are to release said land from the operation of said mortgage and judgments. The said company is also to pay the amount of certain executions now in the hands of Frank B. Ridgway, sheriff, issued on judgments against said Joseph B. Roe in favor of John Clement and Daniel J. Packer, and to pay the amount of tax recorded against the same, and any other liens that may be against said land and real estate, and to pay to me, the

said Henry C. Loudenslager, the sum of two thousand dollars, the amount due me from the said Joseph B. Roe, and also to deduct from the said consideration money the amount of the subscription to the capital stock of the said company by said Joseph B. Roe, being the sum of twenty-five hundred dollars, and then the said company to pay any balance that may remain of the said sum of twenty-three thousand dollars to the said Joseph B. Roe, his heirs and assigns. Witness my hand and seal this 14th day of April, A. D. 1890."

The immediate occasion of this conveyance was, apparently, as was stated in the answer, that a creditor by bond and warrant of Dr. Roe was pressing him; and defendant, on receiving this conveyance, gave his personal undertaking, by due-bill, to pay that creditor. Immediately following this conveyance were the following conveyances: April 15, the executors of Susan Roe to the defendant, consideration \$1, conveying 14 acres and 13-100. This parcel was substantially controlled by Dr. Roe, and it appears that the executors of Susan Roe were afterwards paid \$842.80. On April 16 John H. Dilks conveyed to the defendant 65 acres and 34-100, at an expressed consideration of \$13,000. The actual amount afterwards paid to Dilks was \$8,000, viz.: \$3,000 in cash, over and above a mortgage for \$5,000. On the same day, West Jessup conveyed to defendant 120 acres, less 6 acres conveyed to the railway company, leaving 114 acres, at an expressed consideration of \$23,284, but the amount actually afterwards paid to Jessup was \$17,463. On the same day, Caleb C. Pancoast conveyed to the defendant 78 acres of land, at an expressed consideration of \$15,600, but the actual amount afterwards paid him was \$12,200. On the same day, the heirs of one Reeve conveyed to the defendant 20 acres and 29-100, at an expressed and actual price of \$4,717, or about \$250 per acre. The result of all these conveyances was that there were conveyed to defendant about 413 acres of land, by six several

deeds, at an expressed consideration in each of about \$200 per acre, amounting in the aggregate to \$79,317, to which, if we add the amount actually paid to the executors of Susan Roe, \$842.80, we have a little over \$80,000, while the actual cost was \$66,223. The difference between these sums, \$13,936.80, and the cost of 13 acres not conveyed, \$1,586—in all, \$15,522.80—is the sum claimed by the complainant. Of these 413 acres, 400 were conveyed by defendant to the complainant for \$80,000 cash, including mortgages left upon the property, and \$40,000 in 400 shares of stock of the company. These shares were issued to the defendant, but were by him distributed among the several subscribers to the stock, in the proportion of their subscriptions, so that each subscriber received in the end two shares of stock for each \$100 paid in cash. The \$80,000 of consideration was paid by complainant to defendant as follows:

Mortgages left upon the property, . . .	\$41,100
April 17, Cash,	\$21,500
May 26, Cash,	5,000
June 4, Cash,	3,400
	<hr/>
Total cash,	\$29,900
Judgment in favor of Roe's ex- ecutors against Joseph B. Roe, paid by the company to the executors,	\$9,000
	<hr/>
Total,	\$38,900
	<hr/>
Added to the \$41,100 makes, . . .	\$80,000

Defendant claims to have paid nearly all of the sum of \$29,900 so received by him to Dr. Roe, in cash, either directly or upon his order; but as he claims, and Dr. Roe admits, that he (defendant) was entitled to one-half the profit of about \$15,000 made on the transaction, it is diffi-

cult to believe, and in fact it was not insisted, that he has not in some way retained control of his share of that sum. At the time of the transaction none of the directors, except defendant and Dr. Roe, had any knowledge or notice that this profit was made; and, so far as appears, none of the stockholders, except the same gentlemen and West Jessup and C. C. Pancoast, two of the grantors to defendant, had any knowledge of it. No money was paid by the defendant or Dr. Roe, or either of them, to the vendors, at the delivery of their several deeds. The consideration actually paid went from the corporation, through the hands of defendant, to the several vendors or their creditors. From the foregoing facts, and the proper inferences to be drawn therefrom, the true relations of the parties are to be deduced.

And, first, I think that at the date of the organization of the corporation, March 20, 1890, and the formal contract to purchase, April 10, 1890, neither Dr. Roe nor defendant were in any true sense the owners of any of the land held under options. They had neither paid nor given anything of value for it, nor had they come under personal obligation with regard to it, nor did they intend to exercise their options until they had secured a purchaser. Indeed, it does not affirmatively appear that the option papers which they held were such as could be enforced, either at law or in equity, against the vendors. Two of them—Pancoast and Jessup—seem to have been so far interested in the completion of the sale as to subscribe for stock liberally, and to execute deeds expressing a consideration largely in excess of the amount actually paid to them, and to deliver them without consideration presently paid. So that the inference of the validity of these options arising from the actual carrying out of the sale is not very strong. These circumstances seem to me to prevent the application here of the equitable notion that in case of executory contracts for the purchase and sale of land the title is, in equity, to be treated as being in the vendee, and the purchase price as a debt due

the vendor. I think that doctrine is not properly applicable to the case of an uncertain, and, at best, bare option to purchase, like those here in question. This characteristic—namely, that neither Roe nor the defendant were the owners of these lands at the date of this transaction—distinguishes this case from a line of authorities which hold that a party, being already the actual or potential owner of property, either by having the legal title vested in him, or by holding it under contract with part of the consideration paid, and mutual obligations to pay the balance of the consideration, and to convey the property, may innocently promote and organize a company to buy it at an advance.

2. Both defendant and Dr. Roe were active in procuring subscribers to the stock, and in organizing the company. Defendant was present when the first batch of large subscriptions was made, and himself subscribed among them, and solicited subscriptions and advocated the enterprise. He framed the subscription paper or prospectus. This he admitted on the stand, though denied in his answer. In fact, Dr. Roe swears, and it is manifest from all the circumstances, that he took the defendant into the enterprise mainly to have the benefit of his assistance in this very work of organizing the company, and managing the delicate business of procuring the carrying out of the options, and the vesting the title in the corporation. These facts show that defendant was a "promoter" of this corporation, in any and every sense of that word, as used in such connection by either the American or the English jurists. In this capacity of promoter, as well as that of president of and one of the board of directors, he was clearly acting in a fiduciary capacity. He was, in effect, a trustee for the several subscribers to the stock.

3. Although the contract of sale took the form of a contract by defendant as vendor and the complainant as vendee, yet it is manifest that defendant acted therein in the same fiduciary capacity. He contracted to sell property which

he did not own, and agreed to take in payment of it, besides the cash consideration mentioned in the contract, 400 shares of the stock of the company, which he actually took and held as trustee for the stockholders; and, as to so much of the cash as he actually received, it must have been known and understood by everybody that he was a mere conduit for that, as well as of the title to the land. He paid for the land with the funds of the complainant.

4. Another aspect of the case, arising out of the prospectus, is that he assumed the position of a purchaser jointly with the other subscribers to these lands, and therein acted as the agent of his partners in the enterprise.

5. While thus acting in a fiduciary capacity, and, in effect, as a mere conduit of title, he not only conveyed to the company property at a greater price than he paid to the actual grantors, but he concealed from the company the fact that he had received a greater price than he paid, and even went further, and, in effect, asserted the contrary to the company, by inserting in the deeds to himself a greater price than he paid. Defendant swears that these prices were intentionally arranged so that the sum of the whole should amount to about \$80,000. In fact, in all those purchased under the options the consideration was untruly stated at about \$200 per acre. Now, when we consider that these deeds were sure, in the ordinary course of business, to come under the inspection of the counsel of the company—already elected, as the minutes show—in the examination of the title to these lands, it seems impossible to look upon that untrue statement of the consideration in these deeds as anything short of a positive assertion by the defendant that he had paid, or, rather, was obliged to pay and expected to pay, that much money for those lands. In this connection, the language of the prospectus on the subject of price should be noticed: "This tract of land comprises about 400 acres, at the price of \$200 per acre." This clause was not much commented upon by either counsel at the argument. It

was probably introduced for the purpose of having the assent of the subscribers to purchasing at that price, and such is undoubtedly its effect. But the question remains—purchased from whom at that price? And it is impossible to escape the conviction that it meant that the land was to be purchased from the present actual owners. This, I conclude, would not, under the circumstances, include Dr. Roe or the defendant, as to lands other than those actually owned by the doctor. But I am inclined to the opinion that, like the statement of consideration in the several conveyances, it amounted to an assertion that the amount necessary to be paid was \$200 an acre, and that view has been taken by the courts of similar causes.

6. The unexplained erasure in the minutes of March 20, over which the words "Henry C. Loudenslager" are written, leaves it in doubt whether or not any resolution authorizing a contract between the defendant and the company was ever approved by the board of directors. The general rule covering dealings between trustees and *cestuis que trustent*, and by the trustee with the trust property, are not open to question. They forbid the retention by a trustee of any secret profit made by him in such dealings. He cannot take and retain any commission or bonus, or other profit, out of any sales or purchases made for the *cestui que trust*: Lewin, Trusts, p. 275 *et seq.* The law applicable to this particular class of trustees has recently undergone thorough and careful examination and consideration in this court by the late Vice Chancellor GREEN, as reported in *Fruit Co. v. Buck*, 52 N. J. Eq. 219, 27 Atl. Rep. 1094, and his result is stated at page 230, 52 N. J. Eq., and page 1097, 27 Atl. Rep., as follows: "I take the law applicable to this case to be that 'no rights, legal or equitable, arise in favor of a corporation, in respect of transactions, whether complete or inchoate, merely because entered into in contemplation of the erection of such corporation,' and that it was open to Dr. Buck to buy the property on his own ac-

count, for any price he could, with the intention or in the hope of selling it at a higher price to a company to be formed, and, dealing independently, to sell it for such higher price to such company, so long as he obtained his higher price fairly. That would be clearly unobjectionable. But if he, at the time of his original agreement with White, entered into it on behalf of the future company, under such circumstances that the company, when formed, could say that the purchase made by him was made for the company, or if, at the time the actual purchase was made from White, Dr. Buck was a trustee, officer or agent of the company, he cannot be permitted to make any profit from the sale to the company. Buck, as the promoter of the corporation, stood in a fiduciary relation to the company as soon as it was organized. As such promoter, it was open to him to sell property which he owned, to the company, on making full and fair disclosure of his interest and position with respect to that property. Not only was such disclosure necessary, but it was incumbent on him, as sole promoter of the company formed to purchase the specific property, controlling and molding its organization, to furnish it with an executive or board of directors capable of forming competent and impartial judgment as to the wisdom of the purchase, and the price to be paid ; and if he, as such promoter, procured the company to be formed, and to be managed in such a way as to transfer from the moneys of the company to himself a certain sum, without informing the company of that fact, or, what is the same thing, if he took, without such disclosure, to his own use, stock of the company issued for the purchase of property, ostensibly to or for another, he cannot retain the same." He then supports his conclusion by citations of authorities and extracts from the judgments of the English jurists. At page 234, 52 N. J. Eq., and page 1099, 27 Atl. Rep., he points out that, in determining the true character of the transaction, it is always important to inquire whether the party sought to be charged as a trustee orig-

inally purchased the property with his own money, or whether he used the funds of the company for that purpose. If he did use the funds of the company for that purpose, it is a circumstance strongly tending to characterize his position as that of a trustee.

In addition to the authorities cited by Vice Chancellor GREEN at page 233 of 52 N. J. Eq., page 1099, 27 Atl. Rep., I refer to *Brewster v. Hatch*, 122 N. Y. 349, 25 N. E. Rep. 505; *Land Co. v. Case*, 104 Mo. 572, 16 S. W. Rep. 390; *Mining Co. v. Spooner*, 74 Wis. 307, 42 N. W. Rep. 259; *Parker v. Nickerson*, 112 Mass. 195; *Getty v. Devlin*, 54 N. Y. 403, at page 411; 70 N. Y. 504; *Stove Co. v. Wilcox*, 64 Conn. 101, 29 Atl. Rep. 303; *Porter v. Woodruff*, 36 N. J. Eq. 174; and *Iron Ore Co. v. Bird*, (1886,) 33 Ch. Div. 85. *Brewster v. Hatch* was an action by individual stockholders against the promoters of a corporation organized to purchase certain mines held under option by the promoters, much in the same manner as were the lands here by Dr. Roe and defendant. The opinion of the court (page 362, 122 N. Y., and page 508, 25 N. E. Rep.) refers to, and relies upon, the fact that the promoters, held by the court to occupy a fiduciary capacity, did not disclose to their *cestuis que trustent* the amount they were to pay for the mines, and that they did not intend to exercise their options unless the company was successfully launched. *Getty v. Devlin* was a case much like the present. Four persons combined, and purchased an interest in oil lands at a cost of \$30,000, already paid. Then, as here, they prepared and circulated a subscription paper, by which the subscribers agreed to pay the amount by each subscribed, to purchase the lands in question, at \$125,000. The four promoters themselves, as here, subscribed liberally, but concealed the fact from the other subscribers that they were the proprietors, and also concealed the cost to them of the property. In an action by the stockholders against the promoters, the court of appeals of New York held them liable for the profits made. At page 411, 54 N. Y., Judge

EARL used language applicable to this case. He said: "The subscription paper itself contained, substantially, a representation that the subscribers were to purchase the land in Ohio at a cost of \$125,000. It imported a joint adventure for the purchase of lands from persons not subscribers, at the price named, in which all the subscribers were to be interested as purchasers, upon the same footing, in proportion to their subscriptions. When the four defendants sent forth this paper, with their names subscribed to it, they represented that they would pay the sums by them subscribed for the purchase of the land." And again, at page 412, he says: "There is another ground of liability. The subscribers to the paper agreed jointly, and for their mutual benefit and advantage, to purchase certain lands, designated, for a price named. No one of the subscribers could, after this, purchase the lands for a less price, and compel his associates to allow him more than he paid. His purchase would enure to the benefit of all the subscribers." In *Land Co. v. Case*—a thoroughly argued and well-considered case—the defendants Case and Redburn held options to purchase certain property of one Carter, and promoted a corporation to buy that property at \$32,000, whereas in fact their option compelled them to pay a trifle less than \$30,000. It was held, after a full consideration of the authorities, that Case and Redburn were liable to pay to the corporation—which was, as here, the plaintiff—the amount of the profit which they had received. At page 581, 104 Mo., and page 393, 16 S. W. Rep., in delivering judgment, the court say: "It is argued that the directors finally consented to take the lands and unsold lots at the price of \$32,000; that they got all they contracted for, and the company has no just ground of complaint. They did so consent, but it was upon the representation that \$32,000 was the true consideration paid Carter, and that the notes did not go to Case. For money and property acquired by Case under these untrue representations, occupying the position

he did, he must account. What the company might have done, had Case made full disclosure of his profits, we cannot say, nor is it material to inquire. The argument made by defendants on this question is as bad in law as it is in morals." In *Mining Co. v. Spooner* the defendants obtained a right to purchase a mining option for \$20,000, and then proceeded to form a corporation to make the purchase, representing that the option would cost \$90,000, and having got stock to the amount of \$100,000 subscribed, and the defendants becoming officers of the corporation, purchased the option nominally for \$90,000, paying for it only the \$20,000 which it actually cost, with the money by them received from the subscribers, and retaining \$70,000 for their own use. It was held that the company was entitled to recover. The court held that the defendants, acting first as promoters, and afterwards as officers of the corporation, occupied the position of trustees for the stockholders, and could make no profit out of the transaction. In *Iron Co. v. Bird*, two brothers, (Birds, the defendants,) undertook to make sale of a mineral property for the owners, who were desirous to sell for £90,000, out of which £5,000 might be used for the expenses of promoting a company to purchase the property, leaving £85,000 as the net price. The Birds organized a company to take the property at £100,000, out of which they (the Birds) should receive £10,800 for their profits. An agreement in writing was then made by the owners with a trustee for the prospective company, to sell to him for £100,000. The Birds then employed a solicitor, who got up the prospectus for the company, which stated that the purchase money was £100,000. The Birds subscribed to the memorandum of association for fifty shares each, of £100. The action was brought to recover £10,800 received by them. Held by the court of appeal that they were promoters, and, as such, liable. In delivering judgment, (page 92, 33 Ch. Div.,) LINDLEY, L. J., said: "James Bird in fact procured the formation of the company. He

suggested its formation; he took an active part in the preparation of its prospectus and memorandum and articles of association, in the appointment of two of its first directors, and in the appointment of its secretary; and he procured his own firm to be engaged to conduct the sales of the company, at a large commission. He fixed the purchase money at £100,000, and stipulated for the payment of £10,800 to his own firm; and he procured the payment of that sum by the company, and he was himself a director when the last instalments of it were made. He was, in truth, the person who fastened the contract to pay £100,000 on the company, without disclosing the fact that his firm were to get £10,800 out of the purchase money." Applying to the case in hand the principles thus enunciated, I am unable to perceive how the defendant can escape liability.

Counsel for defendant contended that neither Dr. Roe nor the defendant were in fact promoters of the company, nor did either of them occupy towards it a fiduciary relation which rendered it incumbent on them to disclose the terms upon which they were to obtain title to the outlands, and that neither made any untrue representations in the premises. For reasons already given, I am unable to adopt those views. I think they did occupy fiduciary relations, and I also think that the insertion in the deeds to Loudenslager of a greater price than they paid was an untrue assertion.

It was also urged that the circumstance that the title in this case passed through defendant was not a part of the original plan of the defendant and Dr. Roe, but was the result of fortuitous circumstances, not connected with the case, and ought not to operate to the prejudice of the defendant. I am inclined to the opinion that the defendant's contention of fact in that respect is correct. But, admitting it to be true, the question still remains, how would the case stand if the conveyances from the outside parties had been made to Dr. Roe, and by him to the company, and the suit had

been against Dr. Roe and the defendant jointly? In that case it seems to me that, as against the defendant, the complainant's right to recover his share of the profit would be quite as clear, if not clearer, than it is under the present state of the case. He would then, as now, still stand in the position of aiding Dr. Roe in making a secret profit out of the company, and dividing it with him, and all while he was acting as a trustee of the company. In short, the essence of the transaction would not be changed.

It is further urged that, at the last, the company dealt with the defendant at arm's length, as with a stranger, and at an agreed price. But this is not true, as a matter of fact. The terms of the resolution and of the written contract show, as before observed, that all concerned must have known that defendant was a mere conduit. In the first place, the consideration named was not only the \$200 per acre, in cash or its equivalent, but also, in addition thereto, four hundred shares of stock, which defendant took in trust for the stockholders, and actually distributed among them; and then all the directors must have known that defendant, at the moment of making the contract with him, was not the actual owner of either of the several tracts. In truth, the title to the Roe tract, afterwards acquired, was held by him under a written declaration of trust in favor of the complainant, subject to the payment of the purchase money. These circumstances render it quite impossible to treat the transaction as a dealing with the defendant at arm's length.

Defendant's counsel took the further ground that an additional value was given to the property by the labor and management of the defendant and Dr. Roe in procuring these several options, and thereby consolidating the several tracts held by different titles in one body, and that having thus increased the value of the property, and being, in the view of a court of equity, its owners, they were entitled to sell it to a company to be formed, at the price they

did. And in this connection they rely upon the fact that the subscribers to the stock were mainly residents of the neighborhood, and familiar with the land and the situation, and entirely competent to judge of its value, and that they must be presumed to have purchased on the strength of their own judgment of the value of the property and not upon the actual or implied representation of its cost contained in the documentary evidence hereinbefore referred to. But I think the complete answer to that is found in the fact that, occupying a fiduciary capacity, the defendant failed to disclose to his *cestuis que trustent* the fact that the actual cost of the property was less than that demanded for it. The actual cost was a factor which the purchasers were entitled to know, in forming their judgment as to the value of the property; and they were also entitled to judge for themselves as to whether the labor of the defendant and Dr. Roe in procuring these options in point of fact added to their value in the manner and to the extent argued by the defendant's counsel.

The authority mainly relied upon by the defendant is a case cited by Vice Chancellor GREEN in the Plaquemines case, namely, Gover's Case, [1875,] 20 L. R. Eq. 114; s. c., on appeal, 1 Ch. Div. 182. But that case is clearly distinguishable from the one in hand in this respect: That it was not an action brought by a corporation, or by individual stockholders in a corporation, to recover from its promoter or president a profit made by him in dealing with the company, but it was a motion by a subscriber to the stock of a corporation, against the official liquidator thereof, to be relieved from the burden of her subscription, and to that extent diminish the fund to be distributed, and it was based on the ground that a statutory fraud was practiced upon her, in the prospectus and in the formation of the company; so that it was, in effect, a suit between creditors of a corporation and its stockholders. The case shows that one Skoines was the owner of a patent. He agreed, in

writing, to sell it to one Mappin for £65,000, to be paid £1,000 in cash, and £4,000 within twenty-one days after the allotment of shares in a company to be formed and registered by Mappin for the purpose of working the patent; £15,000 in preferred shares of the company, bearing interest at 15 per cent. per annum; and £45,000 in full paid up ordinary shares of the company. By the agreement, Mappin undertook to form a company. Three months later, Mappin entered into an agreement in writing with one Wright, as a trustee for the intended company, to sell the patent to Wright for £125,000,—£75,000 in cash, and £7,500 two months later, and £45,000 in paid-up shares entitled to a preferential dividend of 10 per cent., and £65,000 in deferred shares. The company was formed, and Miss Gover was a subscriber to the stock. It failed, and a liquidator was appointed. It does not appear that there were any fraudulent statements in the prospectus. The alleged statutory fraud consisted in suppressing the existence of the contract between Skoines and Mappin. The application to be relieved was based upon the idea that Mappin was a promoter of the company. It was held by Sir JAMES BACON, V. C., in the court below, that she was not entitled to be relieved, on two grounds: First, that the fiduciary relation of a promoter was not established against Mappin; second, if it were established against him, its existence did not affect the contract between the company and the shareholders, and that her remedy was by action against Mappin. The appeal was heard by four judges, viz., JAMES and MELLISH, L. JJ., BRAMWELL, B., and BRETT, J. (now Lord Esher.) It was held by JAMES, L. J., and BRAMWELL, B., (1) that Mappin was not, when he made the first agreement with the patentee, a promoter, and the omission to specify that agreement in the prospectus was not fraudulent, under the statute; and (2) that, where the omission to specify any agreement renders the prospectus fraudulent under the statute, a shareholder has his remedy against the person mak-

ing the omission, but cannot therefore have his name removed from the list of shareholders. It was held by MELLISH, L. J., that Mappin was a promoter, and that he ought to have disclosed his agreement to the company, but that the omission so to do did not, under the statute, make the prospectus fraudulent on the part of the company, and that the shareholder, therefore, could not have his name removed, but had his remedy against Mappin. It was held by BRETT, J., that the omission to disclose the first agreement was not a fraud, independently of the statute, but that the omission to disclose a contract formerly made by a promoter, and likely to affect the mind of a subscriber for shares, was fraudulent, under the statute, and that the remedy of the shareholder was to have her name removed from the list of shareholders. MELLISH, L. J., (page 191,) says: "Now, I agree that, if the contract between Skoines and Mappin is to be looked at as an unconditional contract for the sale of the patent from Skoines to Mappin, the company had no interest in the contract, and were not entitled to have its contents disclosed to them. The contract, however, between Skoines and Mappin, was a contract, as it appears to me, upon the condition that Mappin should procure the patent to be sold to a company formed for the purpose of working the patent, and, if such sale was effected, £64,000, partly in money and partly in shares, was to be given to Skoines, and the residue of the price, whether money or shares, was to be retained by Mappin. Now, when the company became the purchaser of the patent—that is to say, when the directors, after the formation of the company, adopted the contract made by Mappin with Wright—Mappin was both a promoter and director of the company. The purchase of the patent by the company, who were the only company then in existence formed for the working of the patent, enabled him, without the knowledge of the company, to fulfil his contract with Skoines, and to earn an enormous profit. It seems to me that there are

grounds for contending that, under these circumstances, Mappin ought not to be considered as the owner of the patent, but only as a person who, by a contract with the owner of the patent, had the disposal of the patent; and in that case he was bound to communicate his contract with Skoines to the company, and as he did not do so the company were entitled to the benefit of that contract." That language applies here, and commends itself by its clear appreciation of what is equitable and just. Its author had the reputation of being the best lawyer of his day in England. The opinions each show that the decision was influenced by the fact that the question was between Miss Gover and the creditors of the company, and not between the company or Miss Gover and Mappin; and it was conceded by all the judges and by counsel that as well the company as the deluded stockholders, individually, might maintain an action or actions against Mappin, either to recover his profits, or the damages which they had sustained by his conduct.

Again, if I am wrong in either or both of the positions above taken—that Roe and the defendant were not the owners, in any proper sense, of these lands at the organization of the company, and were its promoters—and we treat them as actual or potential owners, and not promoters, still it seems to me not to follow that they were relieved from the duty, under the circumstances, of making full disclosure to the stockholders of such ownership. That duty arose from their present position as officers of the company, and they are clearly within the canon laid down by Vice Chancellor GREEN, above quoted; for it is to be observed that the mention of the price of \$200 per acre in the prospectus subscribed by the stockholders did not constitute a contract on their part to purchase any lands at that price. The absence of any contractual force in the language so used was conceded at the argument. It was no more than a statement or assertion of the probable cost of the property, and a limit fixed to its price. Now is there room to contend, upon the

evidence, that the part conveyed by Dr. Roe was worth so much more by the acre than that held by option, and purchased from his neighbors, as to make the average cost of the whole plot \$200 per acre? No proof was adduced or offered in that direction, and there is nothing in the case to warrant the assumption that the part of Dr. Roe's farm conveyed to the company was any more valuable than that conveyed by his neighbors. The fact that the consideration mentioned in the deed from Dr. Roe to the defendant—which, it must be remembered, was in effect, in the view of a court of equity, a conveyance to the complainant—amounted, like the others, to just about \$200 per acre, together with the fact that the difference between the price paid to the option givers, and the price received for the same lands from the company, was treated between the doctor and the defendant as profits to be divided equally between them, forbid the idea that the doctor's lands were worth more than his neighbors. I repeat, then, that I am unable to see how the defendant can escape liability to account to the complainant for the profits which he has made in the transaction in question.

The question whether complainant's decree should be for the whole profit made in the transaction, or for one-half thereof only, was not discussed by counsel, and I express no opinion on it. There may be a reference to ascertain the amount of the profits, and the question as to the amount of the decree may be discussed upon the coming in of the master's report.

FRAUD OF PROMOTERS OF A CORPORATION.

1. **Definition of the Term "Promoter."**—The term "promoter" "has no very definite meaning:" *Emma Silver Min. Co. v. Lewis*, 4 C. P. D. 396; it is "a term not of law but of business, usefully summing up in a single word a number of business operations, familiar to the commercial world, by which a company is generally brought into existence. A man who

carries about an advertising board in one sense promotes a company, but in order to see whether relief is obtainable by the company what is to be looked to is not a word or name, but the acts and the relations of the parties:" *Whaley Bridge Calico Printing Co. v. Green*, 5 Q. B. D. 109; approved in *Yale Gas Stove Co. v. Wilcox*, 64 Conn. 101. But without attempting to define the word, it may be said that any one who, acting on behalf of the corporation, takes an active and efficient part in its organization, is a "promoter;" and that one who does not act on behalf of the corporation, but in his own interest, or the interest of third parties is not a "promoter" in the legal sense, no matter how great a share he may take in the work of organization: *In re Great Wheal Polgooth*, 53 L. J. Ch. 42; *In re Rotherham Alum & Chemical Co.*, 25 Ch. D. 103; *St. L., Ft. Scott & W. R. R. Co. v. Tiernan*, 37 Kans. 606.

2. Status of Promoters.—Since a corporation has no existence before incorporation, it cannot be represented by any one as its agent, and, therefore, as to third persons, promoters are in no sense agents or trustees of the proposed corporation; nor can they be considered as such by anticipation: *Caledonian & Dumbartonshire Junction Ry. Co. v. Helensburgh*, 2 Macq. H. L. Cas. 391; *Munson v. Syracuse, Geneva & Corning R. R. Co.*, 103 N. Y. 58; but as they undertake to act on behalf of the corporation, they are, as to it, both agents and trustees, and are consequently held to the duties and responsibilities of those relations: *Whaley Bridge Calico Printing Co. v. Green*, 5 Q. B. D. 109; *Lydney & Wigpool Iron Ore Co. v. Bird*, 33 Ch. D. 85, reversing 31 Ch. D. 328; *In re Hess Mfg. Co.*, 23 Can. S. C. R. 644, affirming 21 Ont. App. 66, which reversed 23 Ont. Rep. 182. They stand "in a fiduciary position. They have in their hands the creation and molding of the company; they have the power of defining how, and in what shape, and under what supervision, it shall start into existence and begin to act as a trading corporation:" Per Lord CAIRNS, in *Erlanger v. New Sombrero Phosphate Co.*, 3 App. Cas. 1218, affirming 5 Ch. D. 73. They "are not trustees as regards all matters nor at all times, but when once persons who have got a contract for a company to be formed do put forward to the public an option

to join in the company and to take the purchase, then, from the very time when the contract is entered into, they make themselves trustees for the company, and are in the same position as if the company was existing at the time when the contract was entered into:" Per COTTON, L. J., in *Bagnall v. Carlton*, 6 Ch. D. 371. Accordingly, like other trustees, a promoter cannot make any personal profit out of his dealings with the trust property or with the *cestui que trust*, without the knowledge of the latter: see *infra*, § 3; and if he purchases property for the site of the plant of the corporation, and takes the deed therefor in his own name, without the knowledge of the corporation, he holds the legal title in trust for it: *Nester v. Gross*, (Minn.) 69 N. W. Rep. 39; but he is not wholly precluded from dealing with the corporation; the rule only extends to those cases where he acts on its behalf. If he deals with it at arm's length, whether in his own interest, or in that of a stranger, he is not liable to account for it, and his relation to the corporation will be no ground for rescission of the purchase: *Foss v. Harbottle*, 2 Hare, 461; *Densmore Oil Co. v. Densmore*, 64 Pa. 43. In such a case, however, he does not stand in the position of a promoter in the legal sense of the word. So, when a promoter is a member of a firm, which, as a firm, does not bear that relation to the corporation, neither the firm nor the individual members of it are chargeable with the consequences of his promotership, and can deal with the corporation on their own account, as long as they are ignorant of the fact that he is a promoter: *Lydney & Wigpool Iron Ore Co. v. Bird*, 33 Ch. D. 85, reversing 31 Ch. D. 328; but if the firm or its individual members have knowledge of the relation between the member and the corporation, that fact will preclude them from receiving or retaining any secret profit to themselves for services rendered on behalf of the latter: *Falkner v. Scottish Pac. Coast Min. Co.*, 15 Ct. of Sess. Cas. 290.

3. Dealings between Promoters and the Corporation.— Since the promoters of a corporation occupy a fiduciary relation towards it, they must show the utmost good faith in their dealings with and for it. They must disclose all the facts material to the transaction, and must state them truly; or otherwise the

corporation, learning the true state of affairs, may either set aside the transaction, or compel the promoter to account to it for the private profit he has made by his fraud. Accordingly, when a promoter sells to the corporation property previously owned by him or bought by him with the object of selling it to the corporation, or bought under an arrangement by which the corporation pays more than the owner receives, the difference going into the promoter's pockets—in all these cases the profit made by the latter belongs to the corporation irrespective of the question whether the price paid is a fair valuation of the property or not, and the corporation may either rescind the purchase, or compel the promoter to account to it for that profit: *Hichens v. Congreve*, 4 Russ. 562; *Kent v. Freehold Land & Brickmaking Co.*, 17 L. T. N. S. 77; *In re Coal Economising Co.*, 1 Ch. D. 182; *Erlanger v. New Sombrero Phosphate Co.*, 3 App. Cas. 1218, affirming 5 Ch. D. 73; *Burbank v. Dennis*, 101 Cal. 90; *South Joplin Land Co. v. Case*, 104 Mo. 572; *Plaquemines Tropical Fruit Co. v. Buck*, 52 N. J. Eq. 219; *Landis v. Sea Isle City Hotel Co.*, (N. J.) 31 Atl. Rep. 755; *Getty v. Devlin*, 54 N. Y. 403; *Getty v. Devlin*, 70 N. Y. 504; *Dorris v. French*, 4 Hun, (N. Y.) 292; *McElhenny's Appeal*, 61 Pa. 188; *Simons v. Vulcan Oil & Min. Co.*, 61 Pa. 202; *Short v. Stevenson*, 63 Pa. 95; *Central Land Co. v. Obenchain*, 92 Va. 130; *Fountain Spring Park Co. v. Roberts*, 92 Wis. 345; and those who aid him to carry out his scheme are equally liable: *Fountain Spring Park Co. v. Roberts*, 92 Wis. 345. If the corporation, through its officers, is a party to the fraud, the stockholders who are induced to become such in consequence of that fraud may rescind their subscriptions, but not if the corporation is innocent: *Hill v. Lane*, 11 L. R. Eq. 215; *Franey v. Warner*, (Wis.) 71 N. W. Rep. 81. So, if a promoter receives from the owner of the property sold any private remuneration, whether a lump sum as a bonus, or a commission, a percentage on the amount obtained over and above an upset price, or a gift of stock in the corporation, he holds it as trustee for the latter, and it can recover it from him: *Atwool v. Merryweather*, 5 L. R. Eq. 464, *n.*; *Lindsay Petroleum Co. v. Hurd*, 5 L. R. P. C. 221; *Bagnall v. Carlton*, 6 Ch. D. 371; *Emma Silver Min. Co. v. Grant*, 11 Ch. D. 918; *Emma Silver Min. Co. v. Lewis*, 4 C. P. D. 396;

In re Fitzroy Bessemer Steel Co., 32 W. R. 475; *Id. v. Id.*, 33 W. R. 312; Lydney & Wigpool Iron Ore Co. v. Bird, 33 Ch. D. 85, reversing 31 Ch. D. 328; *In re* Hess Mfg. Co., 23 Can. S. C. R. 644, affirming 21 Ont. App. 66, which reversed 23 Ont. Rep. 182; Chandler v. Bacon, 30 Fed. Rep. 538; St. L. & Utah Min. Co. v. Jackson, 5 Cent. L. J. 317; Yale Gas Stove Co. v. Wilcox, 64 Conn. 101; Brewster v. Hatch, 122 N. Y. 349; and as when he himself owns the property, it makes no difference that it is fully worth the price paid; for the corporation is entitled not merely to the worth of its money, but to the best bargain that the promoter can make for it: Beck v. Kantorowicz, 3 K. & J. 230; Yale Gas Stove Co. v. Wilcox, 64 Conn. 101. Thus, when the promoters of a corporation organized to sell a patented article in a certain territory falsely represented that the cost of the territorial rights was \$9,000, concealing the fact that they were to receive one-half of that amount, they were held liable to the corporation therefor: Cook v. Southern Columbian Climber Co., (Miss.) 21 So. Rep. 795. Similarly, if there is a secret agreement between the vendor and promoter that the latter shall receive compensation for his services in forming the corporation, the latter, on learning of the agreement, may treat it as made on its behalf, and recover from the vendor whatever sum has not yet been paid to the promoter: Whaley Bridge Calico Printing Co. v. Green, 5 Q. B. D. 109. Further, this rule against making profit out of contracts on behalf of the corporation extends to any arrangement which will give a promoter who becomes a stockholder an advantage over his fellow stockholders, and applies to the case of an issue of stock to the promoter as full-paid, where he has given no consideration therefor, or has only paid part of the price, and conceals the fact from the rest of the stockholders. In such a case he will be liable to the corporation, and to its creditors, for the unpaid value: Society for Illustration of Practical Knowledge v. Abbott, 2 Beav. 559; Chandler v. Bacon, 30 Fed. Rep. 538; Brewster v. Hatch, 122 N. Y. 349; and a purchaser from him with notice will be equally liable: Wishard v. Hansen, (Iowa,) 68 N. W. Rep. 691. Such an arrangement may be valid, however, if all the then stockholders are cognizant of it, and assent thereto: *In re* British Seamless Paper Box Co., 17 Ch. D. 467; see *In re* Ambrose

Lake Tin & Copper Min. Co., 14 Ch. D. 390; though even then, if there be an apparent intention to defraud future stockholders, the transaction will be fraudulent: *In re* British Seamless Paper Box Co., 17 Ch. D. 467. The corporation, however, is not necessarily entitled to recover the full amount of profit received by the promoter. In fixing the amount of his liability, he should be allowed credit for expenditure of his own funds in legitimate expenses incurred in organizing the corporation, such as surveyor's fees, solicitors' and brokers' charges and newspaper advertising, and for remuneration for his own services, if he is lawfully entitled to receive it: *Emma Silver Min. Co. v. Grant*, 11 Ch. D. 918; *Burbank v. Dennis*, 101 Cal. 90. In *Kent v. Freehold Land & Brickmaking Co.*, 17 L. T. N. S. 77, where a promoter bought land for £1,500, and sold it to the corporation for £6,250, it was held that the difference between the cost and the selling price was to be considered as promotion money; and that as the articles of association provided for the payment of £1,500 promotion money to the promoter, he was only liable to account for the difference between that and the profit made on the sale. But a promoter cannot be allowed credit for illegal expenses, such as a payment to another to obtain a personal guaranty for the taking of stock: *Lydney & Wigpool Iron Ore Co. v. Bird*, 33 Ch. D. 85, reversing 31 Ch. D. 328. He will not be required to refund, however, if the corporation delays too long, and rescission becomes impossible: *Ladywell Min. Co. v. Brookes*, 35 Ch. D. 400, affirming 34 Ch. D. 398; or if the sale was made with the knowledge and assent of all the members of the corporation: *In re* Ambrose Lake Tin & Copper Min. Co., 14 Ch. D. 390. If the corporation refuses to sue on demand of the stockholders, the latter may recover the profit made by the promoter: *Burbank v. Dennis*, 101 Cal. 90; *Teachout v. Van Hoesen*, 76 Iowa, 113; *Getty v. Devlin*, 70 N. Y. 504.

4. Duty of Promoter in dealing with Corporation.—When the promoter is such in the legal sense, he must observe the following requisites in his dealings with or on behalf of the corporation: (1) He must furnish the corporation with a board of directors who will act, in purchasing the property, independently of his influence. and who will be able to exercise a proper

judgment in the matter : *Erlanger v. New Sombrero Phosphate Co.*, 3 App. Cas. 1218, affirming 5 Ch. D. 73 ; *In re Hess Mfg. Co.*, 23 Can. S. C. R. 644, affirming 21 Ont. App. 66, which reversed 23 Ont. Rep. 182 ; *Plaquemines Tropical Fruit Co. v. Buck*, 52 N. J. Eq. 219 ; *Rice's Appeal*, 79 Pa. 168 ; unless he should happen to own the whole of the stock, in which case no one can be injured : *St. L., Ft. Scott & W. R. R. Co. v. Tiernan*, 37 Kans. 606 ; (2) He must disclose the fact that he has an interest in the property to be purchased, in order that the corporation may have full means of judging of the weight to be given to his arguments in favor of the transaction : *Erlanger v. New Sombrero Phosphate Co.*, 3 App. Cas. 1218, affirming 5 Ch. D. 73 ; *Ex-Mission Land & Water Co. v. Flash*, 97 Cal. 610 ; *Burbank v. Dennis*, 101 Cal. 90 ; (3) He must not misrepresent or conceal any material facts, especially the price he has paid for the property. He is not bound to disclose the cost to him at all. He can say to the corporation, "This is my price ; take it or leave it : " *Foss v. Harbottle*, 2 Hare, 461 ; *Densmore Oil Co. v. Densmore*, 64 Pa. 43 ; *Lungren v. Pennell*, 10 W. N. C. (Pa.) 297. But if he professes to disclose it, and states it untruly, he cannot retain the profit he makes thereby : *Erlanger v. New Sombrero Phosphate Co.*, 3 App. Cas. 1218, affirming 5 Ch. D. 73 ; *Ex-Mission Land & Water Co. v. Flash*, 97 Cal. 610 ; *Burbank v. Dennis*, 101 Cal. 90 ; *South Joplin Land Co. v. Case*, 104 Mo. 572 ; *McElhenny's Appeal*, 61 Pa. 188 ; *Simons v. Vulcan Oil & Min. Co.*, 61 Pa. 202 ; *Short v. Stevenson*, 63 Pa. 95 ; *Pittsburg Min. Co. v. Spooner*, 74 Wis. 307 ; *Fountain Spring Park Co. v. Roberts*, 92 Wis. 345. So, if there is any defect in the title to the property owned by the promoter, of which he is aware, but which the corporation has no means of finding out, it is his duty to disclose it, and a failure to do so is equivalent to a fraud upon the corporation, which may compel him to refund the entire purchase money : *Phosphate Sewage Co. v. Hartmont*, 5 Ch. D. 394.

**Fraud—Marital Rights—Conveyance by Husband in
Fraud of Wife—Separate Maintenance—Constructive
Service—Receiver—Pleading—Rights of Grantees.**

MURRAY v. MURRAY ET AL.

(Supreme Court of California. December 11, 1896.)

(115 Cal. 266 ; 47 Pac. Rep. 37.)

When judgment is rendered on default, the findings, if made, do not constitute a part of the judgment roll, (Code Civ. Proc. Cal. § 670,) and the facts are to be looked for in the complaint and judgment. Such allegations of the complaint, however, as are necessary to support the judgment, are deemed to have had confirmation in the evidence.

Under Civ. Code Cal. § 137, which authorizes a deserted wife to sue the husband for the maintenance of herself and of her children, if any, the wife is so far his creditor as to be within Civ. Code Cal. § 3439, which avoids conveyances made in fraud of creditors; and it avoids a conveyance made by the husband with the design to defeat the wife's right of maintenance.

It is immaterial that the transfer was made before marriage, where there has been a previous agreement of marriage, followed by cohabitation and pregnancy, which left the wife no alternative but to carry out the agreement.

In the wife's action for maintenance without divorce, under Civ. Code Cal. § 137, where the purely legal remedies are inadequate, the action carries with it the right to have a receiver appointed, under the general provision for such an officer, (Code Civ. Proc. Cal. § 564,) in all cases "where receivers have been heretofore appointed by the usages of courts of equity."

The wife's claim for maintenance is within the general powers of a court of equity to grant, and is not dependent on the statute; and, since plaintiff's demand may be charged specifically upon the defendant's property, described in the complaint and sought to be subjected, the court has power to appoint a receiver at the beginning of the action.

In such case, where defendant is a non-resident, by means of the receiver's possession of the property, and the due publication of the summons, etc., the court acquires jurisdiction to subject the property seized to the satisfaction of its lawful judgment.

When a complaint contains but one cause of action, it does not affect the substantial rights of the parties that a detail of matters tending to show the extent, form and nature of the relief to which the plaintiff is entitled is erroneously designated as "a separate cause of action;" and, under Code Civ. Proc. Cal. § 475, the error must be disregarded.

In an action for maintenance without divorce, where the wife seeks to have set aside certain transfers of property alleged to be in fraud of her right of maintenance, the judgment cannot extend to a deed not mentioned in the complaint, or affect the rights of transferees who have not been made parties.

In such case, where defendant is a non-resident, and served constructively, the award to plaintiff is limited to the property within the court's control, and no obligation can be imposed on defendant personally.

In such case the court should declare precisely what part of the property is to continue in the hands of a receiver or otherwise subject to the satisfaction of the judgment, and the remainder, if any, should be wholly exempted from the effect of the judgment.

In an action for maintenance without divorce, a physician's bill, incurred by plaintiff during her illness, may be included in an award for plaintiff's maintenance.

HARRISON and TEMPLE, JJ., dissenting.

Commissioners' decision. In banc. Appeal from Superior Court, Fresno county; J. R. WEBB, Judge.

Action by Agnes Murray against Owen Murray and James Murray for maintenance without divorce, and to set aside certain transfers of property. From a judgment in favor of plaintiff, defendants appeal. Modified and amended.

J. H. Daly and Sayle & Caldwell, for appellants.—The court could not render a personal judgment for alimony and costs against defendant, Owen Murray, as it establishes a personal demand against a non-resident only constructively served with process: *Pennoyer v. Neff*, 95 U.S. 714, 741; *Anderson v. Goff*, 72 Cal. 65; 1 Am. St. Rep. 34; *Blanc v. Paymaster Min. Co.*, 95 Cal. 524; 29 Am. St. Rep. 149; *Brown v. Campbell*, 100 Cal. 635, 38 Am. St. Rep. 314; *Belcher v. Chambers*, 53 Cal. 635; *Rigney v. Rigney*, 127 N. Y. 408;

24 Am. St. Rep. 462; *Beard v. Beard*, 21 Ind. 321; *Lytle v. Lytle*, 48 Ind. 200; *Prosser v. Warner*, 47 Vt. 667; 19 Am. Rep. 132; *Harding v. Alden*, 9 Me. 140, 23 Am. Dec. 549. The second count of plaintiff's complaint states no cause of action. Each cause of action must contain in itself all the allegations of fact necessary to constitute a cause of action: *Loup v. California Southern R. R. Co.*, 63 Cal. 97; *Baldwin v. Ellis*, 68 Cal. 495; *Collins v. Bartlett*, 44 Cal. 371; *Kreichbaum v. Melton*, 49 Cal. 50. The wife has no legal right, under any circumstances, to interfere with the engagements of the husband affecting his separate property: Civ. Code, §§ 157, 172; *Smith v. Smith*, 12 Cal. 216, 73 Am. Dec. 533; *Van Maren v. Johnson*, 15 Cal. 308; *Greiner v. Greiner*, 58 Cal. 115; *De Godey v. Godey*, 39 Cal. 157. The judgment is inconsistent with the issues, as well as with the findings and conclusions of law. No equities are recited to justify the appointment of a receiver: *Carpentier v. Brenham*, 50 Cal. 552.

J. P. Meux and *H. M. Johnston*, for respondent.—The jurisdiction of a superior court of this state, obtained by publication of summons, is sufficient to settle all rights or claims to real property situated within the state: Code Civ. Proc. §§ 412, 749; *Perkins v. Wakeham*, 86 Cal. 580; 21 Am. St. Rep. 67; *Pennoyer v. Neff*, 95 U. S. 714; *Arndt v. Griggs*, 134 U. S. 316. The appointment of a receiver was the proper procedure in a case of this nature, and is the common practice: Code Civ. Proc. § 564; Civ. Code, § 140; *Sharon v. Sharon*, 67 Cal. 185, 202; *Stewart on Marriage and Divorce*, § 377, subd. 2; *Belcher v. Chambers*, 53 Cal. 635; *Brown v. Campbell*, 100 Cal. 635; 38 Am. St. Rep. 314. In actions to determine the *status* of parties, the summons may be served by publication: *Estate of Newman*, 75 Cal. 213; 7 Am. St. Rep. 146; *Pennoyer v. Neff*, *supra*. The facts stated in the complaint are sufficient to constitute a cause of action, especially against a general demurrer:

Pfister v. Wade, 69 Cal. 133 ; *Poole v. Wilber*, 95 Cal. 339 ; *Hardy v. Hardy*, 97 Cal. 125 ; *Storke v. Storke*, 99 Cal. 621. Neither party, after entering into a treaty of marriage or contract to marry, can voluntarily, without consideration or knowledge of the other, convey away property so as to bar the other's marriage rights : *Stewart on Marriage and Divorce*, § 44 ; *Bigelow on Fraud*, 149, 150 ; *Strathmore v. Bowes*, 1 Ves. Jr. 22 ; *Taylor v. Pugh*, 1 Hare, 608 ; *Bispham's Equity*, 253 ; *Tisdale v. Bailey*, 6 Ired. Eq. (N. C.) 358 ; *Goodson v. Whitfield*, 5 Ired. Eq. (N. C.) 163 ; *Logan v. Simmons*, 3 Ired. Eq. (N. C.) 487 ; *Leach v. Duvall*, 8 Bush, (Ky.) 201 ; *McAfee v. Ferguson*, 9 B. Mon. (Ky.) 475 ; *Petty v. Petty*, 4 B. Mon. (Ky.) 215 ; 39 Am. Dec. 501 ; *Smith v. Smith*, 6 N. J. Eq. 515 ; *Taylor v. Pugh*, *supra* ; *Peek v. Peek*, 77 Cal. 106 ; 11 Am. St. Rep. 244 ; *Green v. Green*, 34 Kans. 740 ; 55 Am. Rep. 256. Alimony is not dependent upon the question of community property, and may be awarded out of, and the payment made a lien upon, the separate property of the husband : *Robinson v. Robinson*, 79 Cal. 511.

BRITT, C.—Plaintiff having been deserted by her husband, the defendant Owen Murray, she instituted this action against him for maintenance without divorce, and to set aside certain transfers of property made by him to his brother, the defendant James Murray, which obstruct the enforcement of her right. Both defendants being absent from the state—said James residing in Canada—summons was served on them by publication and mailing, as prescribed by statute. They failed to appear, and plaintiff obtained judgment, from which defendants appeal.

In the printed transcript appears a paper entitled "Findings," and it is recited in the judgment that the court, after hearing the evidence, "made and filed its findings of fact and conclusions of law herein;" but, as there was no necessity for findings, and as in such a case findings, if made, do not constitute part of the judgment roll, (Code Civ. Proc.

§ 670,) we can look for the facts of the controversy only to the complaint and judgment. Such allegations of the complaint, however, as are necessary to support the judgment are deemed to have had confirmation in the evidence. It appears from the complaint that plaintiff and defendant Owen, residents of Fresno county, in this state, about August 1, 1893, agreed to intermarry, and at once assumed the relations of husband and wife, and she was got with child by him. On November 7 following they were lawfully married, and in March, 1894, he brought her to the city of San Francisco, where he abandoned her among strangers, and himself departed the state, leaving her in circumstances of miserable destitution. In October, 1893, after the said meretricious cohabitation had begun, said Owen was the owner of divers promissory notes, secured by mortgages of real estate, amounting in face value to near \$6,000, among which was a note and mortgage executed in his favor by one Briscoe for the sum of \$2,000, and another executed by one Crow for the sum of \$1,500. He also owned a sheriff's certificate of sale of certain land in the town of Fresno, and then had possession of such land. Without the knowledge of plaintiff, and with intent to defraud her of the right to subject said property to her claims for maintenance and support, about October 4, 1893, he assigned and transferred said notes and mortgages and said certificate of sale to his brother, said James Murray, who rendered no consideration for such assignment, but was "cognizant of said intent and purpose, and conspired with defendant Owen to get rid of his property in the manner aforesaid, in order to defraud the plaintiff out of the enjoyment and benefit of any portion thereof." At the same time said Owen received back from his brother a power of attorney authorizing him to manage said property for the latter. Acting thereunder, on February 7, 1894, he collected the money due on the note and mortgage of Crow, and released the mortgage, but kept the money for himself.

A deed was made, subsequently to said assignments, conveying the land described in said certificate of sale to said James Murray, and about March, 1894, said Owen leased such land, which had been occupied as the home of himself and plaintiff, to one Smith, who went into possession of the same. The said notes and mortgages, other than that released on February 7, 1894, are within the jurisdiction of the court, and said Owen has no other property within the state to the knowledge of plaintiff. It was further averred in the complaint, that unless a receiver be appointed to take charge of said securities and said land, the defendants would convey the land and remove the securities beyond the control of the court. The prayer was for maintenance and alimony, *pendente lite* and permanent; that the said transfers and conveyance be cancelled and the said property adjudged to belong to defendant Owen; that a receiver be appointed to take charge of the same, etc. By its judgment, rendered November 22, 1894, the court in terms set aside the transfers and assignments described in the complaint, (except that of the Crow mortgage,) and declared the property which was the subject thereof to be the property of said Owen, and chargeable with the maintenance of plaintiff and their infant child. In like manner it declared to be fraudulent and void the said lease to Smith, and also a certain deed of real estate made by one Evans and one Mancourt to James Murray on February 14, 1894, and declared the land described therein to be the property of said Owen. It was further adjudged that plaintiff be permitted to occupy and use the premises in the town of Fresno, formerly occupied by herself and her said husband, and that she be allowed, in addition, the sum of \$25 per month, from December 1, 1894, the payment of the same to be a charge upon said premises, and also secured by a bond in the sum of \$1,500, which said Owen was required to execute with sureties; that, in default of such bond, the receiver previously appointed by the court (who

by the admission of counsel and the recitals in the judgment appears, on the commencement of the action, to have taken possession of all the property involved) deposit the note and mortgage of said Briscoe in the hands of a person designated to receive the same "as security for the payment to plaintiff of said alimony;" that the receiver pay the sum of \$25 to certain physicians named for professional services rendered to plaintiff during illness; "that, when said several sums of money have been paid, and the further payment of alimony, . . . properly secured as provided herein, the receiver is directed to deliver all of said property and effects remaining after said payment into the custody" whence he had taken it, which being done, the receiver shall be finally discharged

1. It may be, as contended by appellants, that in virtue of our statute, (Civ. Code, § 157,) declaring that neither husband nor wife has any interest in the property of the other, the wife in this state, merely because of her conjugal relation, has no standing to attack a voluntary disposition of her husband's separate property, made either before or after marriage, and this for the apparently simple reason that the fact of marriage gives her no interest: *Smith v. Smith*, 12 Cal. 216; *Chandler v. Hollingsworth*, 3 Del. Ch. 99; *Dudley v. Dudley*, 76 Wis. 567, 45 N. W. Rep. 602; *Butler v. Butler*, 21 Kans. 521, *et seq.*; but that is not the question here. Admitting such to be the rule, the plaintiff is not affected by it. She is the deserted wife of defendant Owen, and by reason of his act of desertion is authorized to maintain the action: Civ. Code, § 137. To defeat its purpose he made the transfers of property to his brother. Every transfer of property made with intent to delay or defraud any creditor or other person of his demands is by the statute of Elizabeth, re-enacted in Civ. Code, § 3439, declared void as against all creditors of the debtor, etc. The wife, though not in strictness a creditor of the husband, is yet, as concerns her right to maintenance, so far within the protection

of this statute, that it avoids his transfers made with the design to defeat such right: *Green v. Adams*, 59 Vt. 602, 10 Atl. Rep. 742; *Tyler v. Tyler*, 126 Ill. 525, 537, 21 N. E. Rep. 616, and cases cited; *Stuart v. Stuart*, 123 Mass. 370; *Stew. Mar. & Div.* § 381. See *Lord v. Hough*, 43 Cal. 581. And, the circumstances of this case considered, in our judgment the fact that the marriage had not been solemnized at the time of the transfers to James Murray cannot prevent the application of the rule here. The plaintiff was in that condition that even knowledge of the fraudulent assignments would not have enabled her to exercise a fair option whether she would fulfil her engagement with Owen Murray. To her the alternative was marriage or the continued stain of concubinage and the bastardy of her offspring. In *Taylor v. Pugh*, 1 Hare, 608, the woman, before marriage, and without the knowledge of her intended husband, who had seduced her, executed a settlement of her property for her own benefit. After the marriage the husband filed a bill to set aside the settlement as in fraud of his marital rights. The court denied the relief, the vice chancellor, Sir JAMES WIGRAM, saying: "The husband, by bringing the intended wife to his house, and inducing her to cohabit with him before the marriage, deprived her of the power to protect herself, and thereby precluded himself from telling this court with any effect that his wife has committed a fraud upon him because she has taken the precaution to have her property secured for herself and her children." Conversely, in this instance, the husband has no equity to say that the assignments, which would have been undeniably a fraud against the plaintiff if made after marriage, shall be treated as innocent because made before that event, when by his conduct marriage had become to her inevitable.

2. By § 140, Civ. Code, the court in an action such as this, or for divorce, may require the husband to give reasonable security for providing maintenance, and may

enforce the same by appointing a receiver. This court has said recently that the only authority for the appointment of a receiver in a divorce suit is to be found in that section: *Petaluma Sav. Bank v. Superior Court of City and County of San Francisco*, 44 Pac. Rep. 179. If this be true also of an action for maintenance without divorce, it would seem that the language of the section is yet sufficient to justify the appointment of the receiver made in this case at the commencement of the suit: *Carey v. Carey*, 2 Daly, (N. Y.) 424. But, assuming that the statute does not reach so far, still, in our opinion, the action is, by reason of the inadequacy of purely legal remedies, so much a subject of equitable cognizance that it carries with it the right to have a receiver appointed, under the general provision for such an officer in all cases "where receivers have been heretofore appointed by the usages of courts of equity:" Code Civ. Proc. § 564. That the relief sought is within the general powers of a court of equity to grant, and is not dependent upon statute, has been decided by this court, and the principle has found quite general acceptance: *Galland v. Galland*, 38 Cal. 265; *Story Eq. Jur.* 1423a; *Hanscom v. Hanscom*, 6 Colo. App. 97, 39 Pac. Rep. 885, and cases cited; *Tolman v. Tolman*, 1 App. Cas. D. C. 299. "The wife's claim to alimony is an equitable demand against the husband, and there can be no doubt of her right to attack for fraud any transfers of property made by him with intent to defeat her claim, and that such fraudulent grantees may properly be made defendants to the suit for alimony:" *Hinds v. Hinds*, 80 Ala. 225. The wife having such a demand, and her position being assimilated to that of a creditor of her husband, (*Feigley v. Feigley*, 7 Md. 537; *Tyler v. Tyler*, 126 Ill. 525, 21 N. E. Rep. 616; *Livermore v. Boutelle*, 11 Gray, (Mass.) 217; *Green v. Adams*, 59 Vt. 602, 10 Atl. Rep. 742,) it would appear that a receiver in aid of the enforcement of the demand should be appointed, when the occasion arises, for reasons like to those on which a creditor seeking to avoid

fraudulent conveyances of a debtor is permitted to employ the same instrumentality. The rule in equity is that a receiver may be appointed before answer, provided the plaintiff can satisfy the court that he has an equitable claim to the property in controversy, and that a receiver is necessary to preserve the same from loss: *Bloodgood v. Clark*, 4 Paige Ch. (N. Y.) 574; High, Rec. § 105, and cases cited. As shown, the plaintiff here has a demand enforceable in equity, and it may be charged specifically upon the property described in the complaint: *Robinson v. Robinson*, 79 Cal. 511, 21 Pac. Rep. 1095; Civ. Code, 137, 140, 141; *Plumb v. Bateman*, 2 App. Cas. D. C. 156, 170, 171; *Hanscom v. Hanscom*, 6 Colo. App. 97, 39 Pac. Rep. 885. It seems necessarily to follow that the court had power to appoint the receiver at the beginning of the action. Of course, such a power should be very cautiously exercised, but there is nothing in the present record to show that the court was indiscreet in that behalf.

3. We have dwelt somewhat upon the matter of the receivership, because of the influence of that proceeding on the question of the jurisdiction of the court to render any judgment at all. Service of summons by publication, or other form of substituted service of process for notifying an absentee or non-resident defendant of an action against him is allowed to be effectual "where, in connection with process against the person for commencing the action, property within the state is brought under the control of the court, and subjected to its disposition by process adapted to that purpose, or where the judgment is sought as a means of reaching such property or affecting some interest therein:" *Pennoyer v. Neff*, 95 U. S. 714; *Brown v. Campbell*, 100 Cal. 635, 35 Pac. Rep. 433. Perhaps the jurisdiction in this case is maintainable on the ground that the judgment is sought as a means of affecting an interest in the property described in the complaint. However that may be, we have no doubt that, by means of the receiver's possession of the

property, and the due publication, etc., of the summons, the court acquired jurisdiction to subject the property seized to the satisfaction of its lawful judgment. According to the common experience of mankind the owner of property keeps some oversight of it, wherever situated, and will probably be apprised of the seizure thereof, and so warned of the purpose of the seizure. To accomplish this object, the taking of property into the possession of a receiver is at least as well adapted as the similar taking by process of attachment; and it is common practice to apply property which has been attached in the course of an action *in personam* against a non-resident to the satisfaction of the judgment obtained, although no personal service of summons has been effected. Attachment is not the only means by which the court may acquire control of the property of the absentee defendant, so as to impress the action, as to such property, with the jurisdictional characteristics of a proceeding *in rem*. Several recent cases illustrate our conclusion. Most of them relate to the effect of legislation, such as §§ 412, 749, Code Civ. Proc.; *Hanscom v. Hanscom*, 6 Colo. App. 97, 39 Pac. Rep. 885; *Thurston v. Thurston*, 58 Minn. 279, 287, 59 N. W. Rep. 1017, 1019; *Corson v. Shoemaker*, 55 Minn. 386, 57 N. W. Rep. 134; *Bennett v. Fenton*, 41 Fed. Rep. 283; *Single v. Manufacturing Co.*, 55 Fed. Rep. 553; *Miller v. Jones*, 67 Hun, (N. Y.) 281, 22 N. Y. Suppl. 86; *Arndt v. Griggs*, 134 U. S. 316, 10 Sup. Ct. Rep. 557; *Plumb v. Bateman*, 2 App. Cas. D. C. 156, 171; *Bragg v. Gaynor*, 85 Wis. 468, 55 N. W. Rep. 919. The case last cited was a creditors' bill to reach certain debts evidenced by notes and mortgages executed by residents of the state to Gaynor and by him assigned in fraud of Bragg, a judgment creditor. Both Gaynor and the fraudulent assignee were non-residents, were served with process out of the state, and failed to appear. The court held that such debts were "property within the state," within the meaning of a statute like, in this particular, to § 412 of our Code of

Civil Procedure, as amended in 1893, and that the service of an injunction on the mortgagors, who were made defendants, restraining them from paying to the non-resident creditor, brought the debts under the control of the court, so that its judgment avoiding the assignment, and appointing a receiver to collect the debts and apply the proceeds to the payment of Bragg's demand against Gaynor, was valid. We see no essential difference, as concerns the question of jurisdiction, between that case and the present.

4. It is contended that a portion of the complaint, introduced with the words, "For a separate and second cause of action, plaintiff avers," etc., and which contains virtually all the allegations of the pleading relating to the fraudulent transfers from Owen to James Murray, is insufficient as a statement of a cause of action, in that it fails to allege the husband's failure to provide for the wife's support. The complaint is loosely drawn, but we think it apparent that it contains but one cause of action, and that the portion thereof to which appellants point this objection is not a real attempt to state a second transaction, intended as an independent ground for plaintiff's suit, but is only a detail of matters tending to show the extent, form and nature of the relief to which she is entitled upon her single cause of action, viz., her husband's desertion and his failure to maintain her, and that the words designating it "a separate cause of action" should be disregarded, as an error which does not affect the substantial rights of the parties: Code Civ. Proc. § 475.

5. It was error to cancel the deed made by Evans and Mancourt to James Murray. It is not mentioned in the complaint, and, for anything appearing, Owen Murray had no interest in it. So the lease to Smith should not have been cancelled. Smith was not made a party to the action. He had a right to an opportunity for a hearing, however fraudulent may have been the contract of lease. We think, also, that the court had no power to require said Owen to

execute a bond in favor of plaintiff conditioned for the payment of the alimony allowed to her. No obligation upon him personally can be imposed by the judgment, (*De La Montanya v. De La Montanya*, 112 Cal. 101, 44 Pac. Rep. 345,) and the power of the court to secure the award to plaintiff is limited to the property within its control. The court should not have disturbed the transfers to James Murray any further than the exigencies of the decree in favor of the plaintiff required. Any property not needed for securing the maintenance allowed to her, and which can be restored to the person from whom the receiver took it, as provided in the judgment, is that much which, as between defendants, belongs to James Murray. The court should have declared precisely what part of the property was to continue in the hands of a receiver, or otherwise subjected to the satisfaction of the judgment, and the remainder, if any, should have been wholly exempted from the effect of the judgment.

So far as the facts are disclosed by the record, we see no error in the direction that the receiver pay a physician's bill incurred by plaintiff. It must be assumed that this was found to be part of the necessary maintenance of plaintiff, which was the very purpose for which the funds were in the hands of the receiver. See *Fox v. Mining Co.*, 108 Cal. 475, 41 Pac. Rep. 323; *Robinson v. Robinson*, 79 Cal. 511, 21 Pac. Rep. 1095. If this were an action for divorce as well as maintenance, we should say that the difficulties attending a continuing allowance under the circumstances are such that it would be better to award the plaintiff absolutely a gross sum, or part of the property in question, as in *Robinson v. Robinson*, just cited; but as, possibly, the cohabitation of the parties may be resumed, we think the cause should be remanded, with instructions to the court below to modify and amend the judgment in the particulars wherein we have shown it to be erroneous, and, as so modified and amended, it should stand affirmed.

SEARLS, C., and HAYNES, C., concurred.

For the reasons given in the foregoing opinion, the cause is remanded, and the court below is instructed to modify and amend its judgment in the particulars wherein it is shown by said opinion to be erroneous, and, as so modified and amended, it will stand affirmed. GAROUTTE, J., VAN FLEET, J., McFARLAND, J., and BEATTY, C. J.

HARRISON, J., and TEMPLE, J., dissented.

Fraudulent Conveyances—Divorce—Alimony.

HALL v. HARRINGTON.

(Court of Appeals of Colorado. March 9, 1896.)

(7 Colo. App. 474; 44 Pac. Rep. 365.)

In an action to set aside a fraudulent conveyance, it appeared that the plaintiff began action for divorce from her husband July 9; that, July 12, he made a note in favor of defendant, securing the same by trust deed; that the note and deed were not delivered to defendant until after a decree of divorce carrying alimony was entered several months later. *Held*, that the evidence was sufficient to justify a finding that the deed was fraudulent.

A wife, who has a claim for alimony in a suit pending for divorce, is a creditor within the purview of the statute of frauds, and may maintain a bill to attack a transfer made for the purpose of defeating her claim for alimony.

A decree of divorce adjudging alimony against the husband operates as a judgment against him, enforceable by execution, and filing a transcript in the proper office makes the judgment a lien on real estate in the county, even though the property was not specifically described in the bill or the decree.

A decree of divorce, rendered by the county court, directing the payment of \$1,000 alimony, \$200 counsel fees, and \$30 per month for maintenance of the children during minority, is not void, as exceeding the

jurisdiction of the county court under the statute limiting such jurisdiction to \$2,000.

The grantee in a fraudulent conveyance cannot set up an outstanding debt of the judgment creditor of the grantor in order to defeat the right of such creditor to set aside the conveyance and subject the property to his judgment.

Appeal from District Court, Arapahoe county.

Action brought by Lucy I. Harrington against Sarah A. Hall to set aside a trust deed made by plaintiff's husband, pending a suit for divorce, as fraudulently made to defeat plaintiff's claim for alimony. Judgment for plaintiff, and defendant appealed. Affirmed.

This suit and the one following, of *Harrington v. Johnson*, 7 Colo. App. 483, 44 Pac. Rep. 368; *infra*, p. 517; were tried together, and both appeals were argued and submitted at the same time, though upon different briefs. This comes from the circumstance that they are the outgrowth of another litigation, but were necessarily brought against two people, because they concerned different lots of property, which had been transferred to them by trust deeds operating as a security for alleged debts of George Harrington. One general statement will suffice for both. The differentiating facts will be stated in each case. Lucy Harrington and George intermarried in 1882, and had issue, two children. A disagreement sprung up between them, and she brought a suit for divorce in July, 1892. It was commenced by a personal service of the summons and complaint, and afterwards proceeded to judgment and decree in the following January. According to the terms of this decree, the defendant was bound to pay \$1,000 alimony, in two equal instalments of \$500, \$200 attorney's fees, and the sum of \$30 a month from the 1st day of January, 1893, for the maintenance and education of the two children. The judgment was filed in the county clerk's office, according to the requirements of the statute, to make it a lien on realty, on the 18th of that month.

The decree in the county court, which divorced the parties and provided for the payment of the alimony, specified that the several sums should be a lien on all the real estate belonging to George Harrington, in the state of Colorado, and empowered the plaintiff, in case of his failure to pay, to sell the real estate, or so much of it as might be necessary, to enforce the judgment. We observe the property was not specifically described either in the complaint or in the decree. After the divorce suit was begun, and with the evident purpose to defeat any possible judgment for alimony which the plaintiff might obtain, George Harrington attempted to encumber all his property in favor of his two sisters, to whom he owed divers sums of money. He was indebted to Sarah A. Hall, the appellant, in the sum of \$950. The original debt was evidenced by two promissory notes—one of \$800 and one of \$200. These were signed by both George and Lucy, and only \$100 had been paid on them. George owned two lots of property—one in Cottage Hill addition to the city of Denver, and the other in what is known as "De Lappe Place." In the present suit we are only concerned with the Cottage Hill lots. His interest was an undivided half in six lots, 13 to 18 inclusive, in block 16 in the addition. The divorce suit was begun July 9. On the 12th he made out a note for \$950, and signed and acknowledged a trust deed on these lots to secure the new note of \$950, for the apparent benefit of his sister. He contends the note and mortgage were sent immediately to Mrs. Hall, whereby she became entitled to both the note and the security afforded by the deed. The court found that the note and deed were simply executed to defeat any possible decree for alimony, and were not delivered to Mrs. Hall until after the decree was entered in January, and after its record in the office of the clerk and recorder. George himself testifies he made out the note and deed without any knowledge on the part of his sister, though he claims he sent it directly to her. The trustee, Clinton, started a fore-

closure by advertisement, and Mrs. Harrington brought this action. The plaintiff sought to restrain the enforcement of the trust deed because the note and mortgage were fraudulent as against her. This claim was based on the non-delivery of the deed, the priority of the lien for the alimony, the insolvency of the principal judgment debtor, Harrington, and the knowledge and concurrence of Mrs. Hall in the fraud. The allegations of the complaint need not be further stated, and the opinion will be based entirely on the findings of the court. The court concluded that the note and deed were made to prevent the enforcement of the decree for alimony, that they were not delivered until after the filing of the transcript of the judgment, and that Mrs. Hall had no knowledge whatever of the execution of the note and the deed. He finds they were not given as security, and were not given in payment. He found the only property which Harrington owned at the time the decree was entered was what he conveyed to Mrs. Hall and Mrs. Johnson, and that the decree was a valid lien on the property which was situate in Arapahoe county.

A. B. Seaman, for appellant.

Felker & Dayton, for appellee.

BISSELL, J. (after stating the facts.)—The first point to which our attention is directed by counsel for the appellant is put thus: "The court erred in finding the material issues joined in favor of the plaintiff." Unless we consent to build on this foundation, we are without the material with which to construct the building according to the appellant's plan. Appellate courts are sometimes somewhat chary of expressing their conclusions respecting testimony, and are wont to shield themselves behind the tolerably well-established rule that the findings of a trial court, like the verdict of a jury, must be taken as conclusive on all questions of fact. Courts sometimes conceive it to be their duty to

see that justice is done, and, when occasion requires, to go behind the finding of the verdict to enforce their conclusions. We are called on by counsel to perform that duty in the present case, and an attempt is made to furnish a basis for the departure by the suggestion that the trial of the cause was partly by oral testimony and partly by deposition, thus argumentatively bringing the case within the rule declared by the supreme court, that wherever a cause is tried on depositions it is the duty of the appellate tribunal to sift and weigh the evidence, and determine where the truth lies. We do not pass on this suggestion, but if we should accede to the request it would not vary the result. We are in entire accord with the trial court in its conclusions. The note and the trust deed were undoubtedly made by George Harrington, and the deed filed for record, without the knowledge of his sister, Mrs. Hall, and to forestall any ultimate decree for alimony which the court might render. He made altogether too close connections between the commencement of the divorce suit and the preparation and record of the deed. The suit was started on the 9th of July, and within less than three days, and before the time for answering expired, he attempted to encumber the record with a deed which should take away the entire value of the property as against any judgment which might be rendered. The trust deed was not given to secure the outstanding notes which had been executed by himself and his wife to Mrs. Hall, but to secure a new note given by him alone, and for a sum presumably equal to the amount represented by the paper which his wife had signed. It is an open question when the note and the trust deed were delivered. We are not inclined to accept the statements made by the appellant's witnesses. The notes are not traced, nor is the time nor are the circumstances of the delivery so perfectly stated as to convince us the parties are telling the entire truth respecting it. It was a matter very susceptible of exact ascertainment, and it was for Mrs. Hall, it being

within her power, to produce evidence which should definitely determine this question, if she intended to rely on it for the purposes of a defence. We have very grave doubts whether the note and trust deed were ever delivered to Mrs. Hall until after the record of the decree in the clerk's office in Arapahoe county. At all events, whether this be or be not true, the court has found the \$950 note and the trust deed were not delivered to Mrs. Hall, either to pay the two notes which she held or to secure their payment. Under these circumstances, it is manifest Mrs. Hall acquired no rights, by virtue of her receipt of the trust deed and note, as against the judgment which Mrs. Harrington obtained. As we have already said, we not only accept the court's findings on these questions, but, as the result of our examination of the record, we concur in them.

As we have had occasion to say in the succeeding case of *Harrington v. Johnson*, 7 Colo. App. 483, 44 Pac. Rep. 368; *infra*, p. 517, which is a counterpart to this, it is pretty well settled that a wife, who has a claim for alimony and a suit pending to secure a divorce and compel its payment, is a creditor within the purview of the statute of frauds, and where a deed has been made for the purpose of defrauding her, although she may be technically what is called a "subsequent creditor," yet, if the deed is made directly and distinctly for that purpose, she may maintain a bill to attack the transfer. According to our views, this deed comes within the four corners of the various decisions on this question. The trust deed was executed for a fraudulent purpose, to secure a note which had no legal existence, and for which there was no consideration. It was not given to take up the other two notes nor to secure them. So far as we know, it represents no debt, and there may be a perfect defence to it. Mrs. Harrington became a creditor when she recovered the judgment, and she therefore has the right, under the authorities, to attack the trust deed and prevent its enforcement. We do not

think the court erred in entering its decree: Gregory v. Filbeck, 12 Colo. 379, 21 Pac. Rep. 489; Mitchell v. Sawyer, 115 Ill. 650, 5 N. E. Rep. 109; Morrison v. Morrison, 49 N. H. 69; Bouslough v. Bouslough, 68 Pa. 495; Turner v. Turner, 44 Ala. 437; Dugan v. Trisler, 69 Ind. 553; Bailey v. Bailey, 61 Me. 361; Hinds v. Hinds, 80 Ala. 225; Burrows v. Purple, 107 Mass. 428.

The decree of the county court which adjudged alimony to Mrs. Harrington attempted to make the sum a lien on the property involved in the present suit. The present suit is contended to be unmaintainable, because there was no specific description of the property either in the bill or in the decree. It is insisted county courts have no jurisdiction except as to property within the limits of the county, and are powerless to render decrees which shall be liens on property without this territorial limit. It is quite possible this may be true. We express no opinion respecting it. It may likewise be conceded there is grave doubt whether the decree was operative to establish a lien on the property, so as to defeat the claims of *bona fide* creditors or purchasers for value, or any other person who might be brought within either class. It is a very general rule, that there must be some specific description of the property to be affected by the judgment, either in the bill, or at least in the decree, if the lien depends on the terms of the decree for its existence. While this is true, there seems to be no trouble to regard the decree of the county court as a lien on this property as against Mrs. Hall, without doing violence to any well-recognized legal or equitable principle. Even though the decree might not operate to establish a lien, yet if it was valid as a decree for divorce, and as one adjudging alimony against the husband, it became thereby, as to the sums therein mentioned, a judgment against Harrington for so much money, which was enforceable in the ordinary way by execution. The filing of a transcript of this judgment in the county clerk's office would make the judgment a lien on the

property, which is concededly within the limits of Arapahoe county, wherein the decree was entered, and wherein it was also recorded. Under these circumstances we see no reason to disturb the judgment because the decree of the county court may be in some particulars open to criticism. The power of courts which have authority to render decrees of divorce to make their decrees effectual by declaring them liens on property owned by the defendant in the state, has been adjudged by this court in a recent case, wherein the whole subject was thoroughly examined by the learned judge writing the opinion: *Hanscom v. Hanscom*, 6 Colo. App. 97, 39 Pac. Rep. 885. We do not regard Mrs. Hall as in a position to raise this question, because she is neither a *bona fide* purchaser nor a creditor, nor an encumbrancer for value; and, as between George Harrington and Mrs. Harrington, the decree of the county court was effectual, for it stands unreversed, and was unappealed from by him. When these facts are coupled with the proof respecting the property, the insolvency of Harrington, and the record of the judgment, we think the plaintiff was abundantly entitled to maintain the bill which she filed, and the decree may be upheld.

The decree of divorce is attacked because it is assumed to be for more than the sum of \$2,000, which is the limit of the jurisdiction of the county court. We do not accept counsel's contention respecting it. The decree directed alimony to the extent of \$1,000 to be paid to Mrs. Harrington in two instalments, \$200 to be paid to counsel for their services in the case, and further provided for the payment of \$30 a month thereafter for the maintenance and education of the two children of the marriage during their minority. The argument is, since \$360 a year is to be paid during the minority of the two children, if they should live to be twenty-one, it would make the total amount paid by the defendant more than the sum of \$2,000, which would take the case out of the jurisdiction of the county court,

and render it void because of this excess. The argument seems to be entirely fallacious, although very considerable nicety of reasoning has been exhibited by counsel in support of this contention. We look at the judgment as one, substantially, for \$1,230, as originally entered. This, of course, was within the county court's jurisdiction. In reality the decree with reference to the \$30 a month was in no sense alimony, and no part of the money which was to be paid to Mrs. Harrington for her support and comfort, but was a sum decreed against the husband for the care and maintenance of the children which were left in the custody of the wife. They were the husband's children. He was bound, both in law and morals, to maintain and educate them. The sum adjudged for that purpose was a very modest sum, and not more than would be apparently adequate for the purpose. From its receipt and expenditure the wife derived no advantage, and we are unable to see that the decree in this respect so alters its fundamental character as to take it out of the jurisdiction of the county court. The position is not well taken.

There is but one remaining proposition to which we need pay any attention, in order to dispose of all the practical questions involved. The rule that he who seeks equity must do equity is invoked in favor of Mrs. Hall, because of her ownership of the two notes of \$800 and \$200, which are assumed to be still unpaid. It is insisted, since Mrs. Harrington signed those notes and owes the debt with her husband, it would be inequitable to permit her to enforce her decree for alimony, as against this property, to the destruction of the trust deed which Mrs. Hall holds. The features of the case are not such as to permit the application of the doctrine. According to the findings of the court, the deed was not a security. It was fraudulently executed, to defeat Mrs. Harrington's claim, and Mrs. Hall is without right to hold it, because she is neither a creditor nor a purchaser with respect to the note secured by it. She took the \$950

note neither in payment nor as security for the other two, and she is therefore not the holder of any claim conveyed by or embraced within the terms of the deed. It is quite within the range of possibility that Mrs. Harrington may simply have been security on those two notes, and her husband the principal debtor, who has long since liquidated them. At all events, whether this be or be not true, when once it is conceded the trust deed is fraudulent as against the judgment which Mrs. Harrington obtained, and that Mrs. Hall is without legal or equitable right to the security or the note which it covers, she cannot import into the case an outstanding legal liability on the part of Mrs. Harrington to defeat her right to invalidate the security and subject the property to the payment of her judgment. Besides, the matter was not litigated on any such hypothesis, the notes were not claimed as a set-off, nor is it at all clear the right to offset the one claim by the other could ever exist. We are unable to see any force in the suggestion respecting the applicability of this well-understood doctrine.

There seems to be presented in the arguments no other proposition which calls for discussion. As to some of the questions suggested, the opinion of the court about them has been very fully covered by the opinion in the other case, and, so far as we can see, the court has expressed itself on every proposition presented by the appeal. We are unable to perceive any errors in the record which require us to reverse the judgment, which will accordingly be affirmed.

Fraudulent Conveyances — Divorce — Alimony — Evidence—Burden of Proof—Negotiable Instruments—Bona Fide Purchasers.

HARRINGTON v. JOHNSON ET AL.

(Court of Appeals of Colorado, March 9, 1896.)

(7 Colo. App. 483; 44 Pac. Rep. 368.)

In an action against the holder of a note and mortgage given in fraud of creditors, to set aside the conveyance, the fraudulent character of the original transaction being shown, the burden of proof is upon the holder to show that he was a *bona fide* purchaser for value before maturity.

The purchaser of a promissory note, who gives his check in payment therefor, is not, in the absence of any specific acceptance of the check as complete payment, or proof of subsequent payment, such a *bona fide* purchaser for value as to be entitled to protection as an innocent holder of the note.

Error to District Court, Arapahoe county.

Action brought by Lucy I. Harrington to set aside a trust deed, executed by plaintiff's husband, conveying certain real estate to Viola Johnson, as security for a note. The note was purchased from her by A. L. Hoblit. There was judgment for defendant, and plaintiff brings error. Reversed.

To learn the principal facts on which this case rests, reference must be had to the statement in the case of Hall v. Harrington, 7 Colo. App. 474, 44 Pac. Rep. 365; *supra*, p. 507, which immediately precedes this. We now state those facts which distinguish this from the other. The trust deed involved was executed concurrently with the one which was given to Mrs. Hall, to wit, on the 12th of July, 1892. It covered lots 13 to 20, inclusive, in block 6, De Lappe Place. It was given to secure a note for \$1,423, due one year after date, and payable to the order of Mrs. Johnson. The note did not represent a *bona fide* indebtedness for the whole amount of it. Mrs. Johnson sent

some money to Harrington to loan for her on such terms and at such interest as he might be able. Of the fourteen hundred and odd dollars sent, he loaned \$500 to one McConnell, taking his note therefor, with security in the shape of school warrants, which were delivered, with the note, to Mrs. Johnson. This note was afterwards paid by McConnell, so that the actual sum which Harrington owed, if he owed anything, was a little upward of \$900. The note was for the full sum sent. The court finds the note and trust deed were not given for the purposes of payment, or received by Mrs. Johnson until after the transcript of judgment had been filed in the clerk's office. The trust deed was executed to defeat the enforcement of any decree for alimony, and the probabilities are the note and deed were held until the final determination of the divorce suit. Ultimately, they came into Mrs. Johnson's possession. She is a woman of some property. She lives in Carlinville, Ill., and done some business with a national bank of which A. L. Hoblit is the cashier. Early in 1894, Mrs. Johnson took the note to Hoblit and sold it. He gave her his check for the amount of the purchase price, without any agreement, directly or indirectly, regarding the disposition of the proceeds, and, according to the finding of the court, became the *bona fide* purchaser of the note, without notice of the fraudulent transaction between Harrington and Mrs. Johnson. These are the only facts and circumstances wherein this case differs from the preceding one. They are exceedingly important, because the case really turns on these independent circumstances. Hoblit intervened. On trial, Hoblit's right was adjudged superior to the lien held by Mrs. Harrington, who prosecutes error.

Felker & Dayton, for plaintiff in error.

A. B. Seaman, for defendants in error.

BISSELL, J. (after stating the facts.)—If the suit concerned only Mrs. Harrington and Mrs. Johnson, the case would be

relieved of all difficulty. The circumstances attending the execution of the trust deed and the time of its delivery, the manner of the sale of the note, and the evidence of Harrington, all confirm us in the conviction that it was the outcome of a deliberate, cruel and extremely reprehensible proceeding on Harrington's part to defraud his wife and children out of any possible support from the avails of his property. We do not believe the deed or the note were ever executed or delivered when he states they were, nor that they were received by Mrs. Johnson at the time of their execution, nor until very shortly before the date when the note was sold to Hoblit. While there is no direct evidence on the subject, the character of the instrument, the amount for which the note was drawn, the fact of its sale shortly after the rendition of the decree of divorce, convince us it was a fraudulent transaction between Harrington and his sister, carried on for the sole purpose of putting the property out of the reach of the judgment which Mrs. Harrington had obtained. There would be no difficulty whatever in holding the transfer fraudulent as against Mrs. Johnson for several well settled and established reasons. The note and trust deed were given for more than the sum due. Harrington did not owe Mrs. Johnson \$1,423, and whether he owed any sum or not may be questioned. At all events, the debt was reduced by the McConnell note of \$500. This note was paid by McConnell. Harrington did not owe this money. He was under no obligations to give any note for it, or to execute a trust deed to secure it. We quite agree with the court that the note and trust deed were not given in payment nor as security, and, being for more than the sum due, the conveyance is fraudulent, and may be, on the application of a creditor, set aside, or subordinated to his lien. Under the authorities, Mrs. Harrington undoubtedly occupies the position of a creditor, with the right to attack a fraudulent conveyance as being against her interests. She was probably a creditor at the time the note and mortgage

were delivered. The trust deed and note were executed with the intent to defraud her, who was likely to become a creditor by virtue of a decree for alimony. The decree and the nature of the judgment are such as to put her legally in a position to maintain a suit to effectuate her decree as against this fraudulent transfer. On this point the better authorities all agree, and both propositions may be deemed established by a well-considered line of cases: *Gregory v. Filbeck*, 12 Colo. 379, 21 Pac. Rep. 489; *Mitchell v. Sawyer*, 115 Ill. 650, 5 N. E. Rep. 109; *Morrison v. Morrison*, 49 N. H. 69; *Bouslough v. Bouslough*, 68 Pa. 495; *Turner v. Turner*, 44 Ala. 437; *Dugan v. Trisler*, 69 Ind. 553; *Bailey v. Bailey*, 61 Me. 361; *Hinds v. Hinds*, 80 Ala. 225; *Burrows v. Purple*, 107 Mass. 428.

Evidently, we would have no difficulty to adjudge the transfer fraudulent, and subrogate Mrs. Johnson's claim under the trust deed to the lien of the judgment for alimony. The difficulty in the case springs from the transfer of the note to Hoblit. This transaction is not free from suspicion, and it is to be regretted that both Hoblit and Mrs. Johnson were not subjected to a searching cross-examination as to the history of the transaction. The evidence is neither clear nor satisfactory to the point that Hoblit was the purchaser of that note in good faith for a valuable consideration. An absolute payment of the price agreed on at the time of the transfer is undoubtedly essential to Hoblit's title. The case comes here in a somewhat peculiar form. It was tried to the court, and, on the conclusion of the case, the court rendered a written opinion announcing its conclusions. There were no specific findings of fact and conclusions of law. In the prior case of *Hall v. Harrington*, 7 Colo. App. 474, 44 Pac. Rep. 365; *supra*, p. 507; we were requested by counsel to weigh and sift the evidence and determine for ourselves what the facts were, deciding it upon the record, uninfluenced by the apparent opinion of the court. We did not in

that case, nor do we in this, declare it to be the rule that, where cases are tried partly on oral testimony and partly on deposition, the court is free to pursue this course, unhampered by the conclusions of the trial court. Probably, if the evidence in the record was direct, certain, definite and unmistakable on the point under consideration, and the court had, on the testimony, distinctly found Hoblit to be a purchaser of the note for a valuable consideration, we should have accepted this conclusion. It is otherwise. To quote the language of the learned judge: "I think the evidence shows that Hoblit purchased the note without notice of the fraudulent transaction, as between Harrington and Mrs. Johnson. . . . I think the giving of a check by Hoblit for the purchase money is sufficient to constitute a payment for the purposes of this action." This is quoted, because the decision is put on this point. It is universally true that an assignee of a promissory note underdue takes it free and clear of equities. It would be useless to support this rule by the citation of authorities. If, then, Hoblit took this note before it became due, and paid value for it, he took it clear of all the equities which might be asserted, either by Mrs. Harrington, George Harrington, or Mrs. Johnson. His title would be unquestionable. Manifestly, the rights of Hoblit must be determined by the character of his purchase. There is no direct finding that Hoblit paid the cash on the purchase, or that he paid it otherwise than by a check on the bank of which he was cashier, which was given to Mrs. Johnson when the note was assigned. We are quite of the opinion the court assumed the giving of the check to be sufficient evidence of payment, leaving it to the plaintiff to attack the transaction by competent evidence if she were able. In this respect we think the trial court misconceived the law with respect to payments by check. According to Hoblit's deposition, when he was asked in what form he paid Mrs. Johnson for the note, he stated that he gave her

a check for it. He is entirely silent as to what became of the check, whether it was ultimately paid, or whether, in point of fact, Mrs. Johnson ever received the money which it represented. It is quite true, in the course of his deposition, he states he neither directly nor indirectly made any agreement with Mrs. Johnson regarding it. In the purchase he relied partly on the security furnished by the trust deed and partly on Mrs. Johnson's individual responsibility. Both considerations entered into the transaction. If his general language respecting the purchase could be taken as expressive of the exact facts, there would be no difficulty in holding he bought the paper for a valuable consideration. His statement that he gave her a check destroys the value and force of his general evidence.

The court seems to have proceeded on the hypothesis that the burden of proving the facts respecting the purchase was with Mrs. Harrington, and not with Hoblit. This does not harmonize with our views of the case as it stood when this point became important. It will be observed the transaction between George Harrington and Mrs. Johnson was fraudulent and void, and Mrs. Johnson's lien, if she had one, was subordinate to Mrs. Harrington's judgment for alimony. When it was once established the original transaction was fraudulent, there was no escape from the conclusion that the payee acquired no rights or equities superior to the plaintiff's lien. The only way by which it could be then avoided was by the production of proof by the holder of the note that he became a purchaser for a valuable consideration, paid before the maturity of the paper. The burden was on him to establish this proposition, because at the time he entered into the litigation, speaking of it in a technical way, the case was ripe for a decree subordinating the lien of the trust deed to that which had been obtained by Mrs. Harrington. To overcome this case, Hoblit must establish that he bought the paper. This duty was not performed by the naked declaration that he purchased the

note and paid \$1,423 for it, when the force and effect of this testimony is eliminated by his own evidence that he gave a check for the note, and neither produced the check and proved its payment, nor offered any evidence to bring the case within the very well-established rule respecting payments by check. As will be hereafter shown, there is no presumption of payment arising from the delivery of a check. The payment must be established by independent testimony, unless there be something tending to show an agreement that the check was accepted as payment. The case is silent on this subject. Mrs. Johnson never agreed to take the check in satisfaction, and, if it was not paid, Hoblit did not become a *bona fide* purchaser for value, nor did he thereby overthrow the case which Mrs. Harrington had made out. Since the burden was on him, he was bound to sustain it. He cannot complain if he is harmed by his neglect. He knew his rights and the condition under which they could be enforced, and, being a cashier of a bank, and a dealer in commercial paper, he must have had a very keen sense of what he was compelled to prove to establish a purchase in good faith. It may seem a little severe to reverse a case on a simple proposition so easily settled, but we are quite agreed that the ultimate defeat of this trust deed, if it can be accomplished without doing violence to any legal proposition, will do substantial justice between the original parties. Unless innocent third persons are involved, we should not hesitate to bring about this result. The court is agreed as to this proposition, and unless Hoblit brings himself clearly within these lines, he cannot assert the rights which belong to the purchaser of commercial paper.

It may be stated, as a general proposition, with regard to which there is very little division among the authorities, that the acceptance of a check raises no presumption that it is taken in payment. It is only regarded as a payment in case it is ultimately paid. The giving of a check does

not operate to pay nor to extinguish a debt, in the absence of a specific agreement to that end. It is only a means of payment, and unless a loss is sustained by the drawer in consequence of the laches of the holder, the debt will not be discharged, and then only in proportion to the loss sustained. If the check is not paid, the creditor may sue on the original debt, and the check will not be evidence of the payment, unless there be distinct proof that it was actually cashed, or some evidence which shows a loss has fallen on the drawer. This rule respecting presumption from the giving of a check has been recognized in this state, in an opinion delivered by the present learned chief justice of the supreme court: *Larsen v. Breene*, 12 Colo. 480, 21 Pac. Rep. 498; 2 Edw. Bills, § 748 *et seq.*; 3 Rand. Com. Paper, § 1555; *Blair v. Wilson*, 28 Gratt. (Va.) 165; *Heartt v. Rhodes*, 66 Ill. 351; *Davison v. Bank*, 57 N. Y. 81; 2 Daniel, Neg. Inst. (4th Ed.) § 1623; *Boom Co. v. Sanborn*, 36 Mich. 358. Such being the rule of presumptions when payments are made by check, we must conclude there was no sufficient proof that Hoblit became a purchaser for value before maturity. This he must establish, in order to assert the lien of the trust deed.

We clearly recognize the importance and significance of another question, which has been very elaborately argued, and on which, if the court was in unison and free from doubt, it would express an opinion, that there might be an end of the litigation. There is some doubt respecting the right of the appellee to enforce the lien of the trust deed as against the lien Mrs. Harrington obtained by filing her judgment in the county clerk and recorder's office prior to the time the note was transferred to Hoblit. We prefer to leave this question open. The error which has been discussed is clearly one on which the case must be reversed, and the court prefers to rest its decision on this conclusion, respecting which there is no controversy. There is, undoubtedly, a line of authorities which hold the note to be

the principal thing and the security an accessory, and that the rights of the holder of the paper determine his title to the security. Some cases incline to the view that Hoblit would take the trust deed, as he took the note, free from all claims, and as of the date when the deed was filed for record. There is another line, where the decisions have been rendered in litigations over the transfer of bonds which have been secured by mortgages which are non-negotiable, wherein the reasoning would seem to suggest that a party who had acquired an intervening right, of which the purchaser had notice, might assert it against the assignee of the security. As suggested, this question is not free from difficulty, and the reversal is therefore rested on a proposition which must determine the appeal, though we thereby leave one matter open which may compel further litigation. The result is unavoidable, but, since the case may possibly be very much varied by subsequent proof, we deem ourselves entirely justified in pursuing this course. For reasons suggested, the judgment will be reversed, and remanded for a new trial, in conformity with this opinion.

FRAUD ON ALIMONY.

1. Conveyance in Fraud of Alimony Void as to Wife.— A conveyance or disposition of his property by a husband, made with the intent to deprive his wife of her claim for alimony on obtaining a divorce, is within the statute of 13 Eliz. c. 5, which provided for "the avoiding and abolishing of feigned, covinous and fraudulent feoffments, gifts, grants, alienations, conveyances, bonds, suits, judgments and executions, devised and contrived of malice, fraud, covin, collusion or guile, to the end, purpose and intent to delay, hinder or defraud creditors and others of their just and lawful actions, suits, debts, accounts, damages, penalties, forfeitures, heriots, mortuaries and reliefs," and which, in a more or less modified form, has been adopted in most, if not all, of the states of the union. That statute and its progeny refer to subsequent as well as existing creditors;

and "there is no reason why a wife, whose husband has deserted her, and refused to perform the duty of maintenance, or who by cruel treatment has compelled her to leave his house, and commence proceedings for divorce and maintenance, should not be viewed as a *quasi* creditor, in relation to the alimony which the law awards to her:" *Bouslough v. Bouslough*, 68 Pa. 495. Any such conveyance or disposition of the husband's property, therefore, is void as to her, in the hands of a voluntary purchaser, or purchaser with notice: *Tyler v. Tyler*, 126 Ill. 525; *Metzler v. Metzler*, 99 Ind. 384; *Plunkett v. Plunkett*, 114 Ind. 484; *Picket v. Garrison*, 76 Iowa, 347; *Boog v. Boog*, 78 Iowa, 524; *Chase v. Chase*, 105 Mass. 385; *Gilson v. Hutchinson*, 120 Mass. 27; *Byrnes v. Volz*, 53 Minn. 110; *Jiggitts v. Jiggitts*, 40 Miss. 718; *Verner v. Verner*, 64 Miss. 184; *Wetmore v. Wetmore*, 5 Oreg. 469; *Reynolds v. Vance*, 1 Heisk. (Tenn.) 344; *Jenny v. Jenny*, 24 Vt. 324; *Wilke v. Wilke*, 28 Wis. 296; *Barker v. Dayton*, 28 Wis. 367; whether made during the pendency of the suit for divorce, be it in the same or another state: *Blenkinsopp v. Blenkinsopp*, 1 De G., M. & G. 495; *Turner v. Turner*, 44 Ala. 437; *Frakes v. Brown*, 2 Blackf. (Ind.) 295; *Powell v. Campbell*, 20 Nev. 232; *Questel v. Questel*, *Wright*, (Ohio,) 492; *Barrett v. Barrett*, 5 Oreg. 411; *Bouslough v. Bouslough*, 68 Pa. 495; *Boils v. Boils*, 1 Coldw. (Tenn.) 284; *Brewer v. Connell*, 11 Humph. (Tenn.) 500; or before it is begun, though after the cause of divorce has accrued: *Hinds v. Hinds*, 80 Ala. 225; *Busenbark v. Busenbark*, 33 Kans. 572; *Livermore v. Boutelle*, 11 Gray, (Mass.) 217; *Burrows v. Purple*, 107 Mass. 428; *Morrison v. Morrison*, 49 N. H. 69; *Foster v. Foster*, 56 Vt. 540; *Damon v. Damon*, 28 Wis. 510; or even if made before the ground for divorce has arisen, if the intent to defraud existed at the time: *Gregory v. Filbeck*, 12 Colo. 379; and even though made for a full consideration, if with the intent to defraud the wife: *Bailey v. Bailey*, 61 Me. 361. The Texas statute expressly avoids such conveyances: *Berg v. Ingalls*, 79 Tex. 522. Thus, when a husband confesses a crime, which, if punished by imprisonment for a certain length of time, would entitle his wife to a divorce, and transfers his property to a trustee for the purpose of defrauding her of alimony, in case she should sue for a divorce, the transfer will be

void, as against the wife's claim under a decree of divorce subsequently rendered : *Green v. Adams*, 59 Vt. 602. So, when a husband abandoned his wife and shortly afterwards sold the house in which they had lived, and in which he was still living, to his cousin, at the same time agreeing to rent it of the cousin by the month, and upon failure to pay the rent, to surrender possession without demand or notice, and, the rent not being paid for the first month, the wife was put out under a forcible detainer, without having any knowledge of the previous sale or lease, it was held that the whole transaction was fraudulent as to her, and that in allotting her alimony the husband was still to be considered as the owner of the house : *Johnson v. Johnson*, (Ky.) 2 S. W. Rep. 487 ; and when a man, just before beginning a suit for divorce, conveys to another all his real and personal property, including his house, without receiving any cash payment therefor, or any written security, and without any definite time of payment being agreed upon, and depending upon the grantee's verbal promise to give him some money from time to time, the conveyance will be held fraudulent as against the wife : *Fields v. Fields*, 2 Wash. St. 441.

A conveyance of personal property with intent to defraud the wife is void, equally with a conveyance of real estate : *Dunnock v. Dunnock*, 3 Md. Ch. 140 ; *Green v. Adams*, 59 Vt. 602 ; *Fields v. Fields*, 2 Wash. St. 441 ; and a conveyance in fraud of the wife's right to separate maintenance is void, equally with one in fraud of alimony : *Hinds v. Hinds*, 80 Ala. 225 ; *Tyler v. Tyler*, 126 Ill. 525 ; *Bear v. Bear*, 145 Ill. 21.

2. What Conveyances will be Avoided.—Any disposition of the husband's property in fraud of the wife's claim will be void as to her ; *e. g.*, a mortgage : *Dugan v. Trisler*, 69 Ind. 553 ; a deed of trust : *Scott v. Magloughlin*, 133 Ill. 33, affirming 33 Ill. App. 162 ; a chattel mortgage : *Gardenhire v. Gardenhire*, 2 Okl. 484 ; a confessed or collusive judgment : *Dullard v. Phelan*, 83 Iowa, 471 ; *Busenbark v. Busenbark*, 33 Kans. 572 ; an assignment of his contract of purchase : *Glick v. Glick*, (Mich.) 68 N. W. Rep. 153 ; and an assignment or release of her chose in action : *Krupp v. Scholl*, 10 Pa. 193 ; *Gibson v. Gibson*, 46 Wis. 449. Thus, in *Tyler v. Tyler*, 126 Ill. 525, it was held that an

assignment of securities upon an agreement to pay the assignor a fixed yearly sum for his support, should he demand so much, accompanied by a written agreement by the assignee to surrender back the property, whenever the assignee should demand it, neither of the instruments being recorded, was void against the claim of the wife of the assignor for alimony. A conveyance in contemplation of marriage may also be set aside as a fraud on the wife's right of alimony, or separate maintenance: *Way v. Way*, 67 Wis. 662.

3. What Conveyances will not be Avoided.—If the evidence shows that the conveyance was *bona fide*, and that the grantee was innocent of any fraudulent intent, it will not be set aside: *Dunnock v. Dunnock*, 3 Md. Ch. 140; *Laughery v. Laughery*, 15 Ohio, 404; and it will not be disturbed if the judgment for alimony is merely nominal; at least not until after a refusal or failure to pay the judgment: *Chapman v. Chapman*, 13 Ind. 396. If there is no cause for divorce, and the wife merely threatens to bring suit therefor without attempting or intending to do so, a conveyance by the husband is no fraud upon her: *Ullrich v. Ullrich*, (Conn.) 37 Atl. Rep. 393. Moreover, the inchoate right of the wife to alimony dies with the dismissal of the libel; and a subsequent conveyance by the husband, previous to the filing of a libel by him, is not necessarily fraudulent as to her: *Janvrin v. Janvrin*, 60 N. H. 169; but where the wife dismisses her libel at the solicitation of her husband and his friends, and he subsequently conveys his property to one of those friends, that conveyance will be set aside on her obtaining a divorce on a second libel: *Brooks v. Caughran*, 3 Head, (Tenn.) 464; *Nix v. Nix*, 10 Heisk. (Tenn.) 546. It would also seem that the mere pendency of a suit for divorce and alimony is not constructive notice of the wife's claim under the doctrine of *lis pendens*: *Feigley v. Feigley*, 7 Md. 537; and accordingly, if property of the husband is neither embraced in any schedule filed in the suit, nor disposed of by the final decree, granting the divorce, a *bona fide* sale and conveyance of the same, made by him after the separation, and pending the suit, is not affected by the decree: *Almond v. Seamans*, 89 Ga. 309. But if the complaint definitely describes the lands, and

prays that they be set aside to the wife, the doctrine of *lis pendens* applies: *Powell v. Campbell*, 20 Nev. 232. Further, the wife may forfeit her right to set aside a conveyance in fraud of alimony, by laches: *Chapman v. Chapman*, 48 Kans. 636; or by her inequitable conduct: *e. g.*, if she join her husband in conveying land to a third person to put it beyond the reach of an anticipated action against the husband, she cannot, after obtaining a divorce, maintain an action to have the conveyance set aside, and the land subjected to the payment of a judgment for alimony in her favor: *Barrow v. Barrow*, 108 Ind. 345.

4. Remedies of Wife—Parties.—The conveyance may be attacked in the divorce suit, without a misjoinder of actions: *Hinds v. Hinds*, 80 Ala. 225; *Prouty v. Prouty*, 4 Wash. St. 174; or it may be set aside by bill in equity: *Hanscom v. Hanscom*, 6 Colo. App. 97; but in either case the fraudulent grantee must be made a party to the suit: *Taylor v. Wyld*, 8 Beav. 159; *Damon v. Damon*, 28 Wis. 510; *Gibson v. Gibson*, 46 Wis. 449; and may be subjected to such judgment as the plaintiff's equities require: *Damon v. Damon*, 28 Wis. 510. The husband is a necessary party to a bill in equity to set aside the conveyance: *Foster v. Hall*, 2 J. J. Marsh. (Ky.) 546; and the wife is the proper party plaintiff; a receiver or sequestrator appointed by the court to receive the personal estate and rents and profits of the real estate of the husband has no right to maintain such an action in his own name: *Donnelly v. Shaw*, 7 Abb. N. C. (N. Y.) 264; *Foster v. Townshend*, 68 N. Y. 203; but he may do so when expressly authorized by statute: *Barker v. Dayton*, 28 Wis. 367. The conveyance should not be adjudged absolutely void, however; the land should simply be subjected to a lien for the payment of the alimony: *Draper v. Draper*, 68 Ill. 17; or the purchaser be ordered to pay her alimony out of what he still owes the husband for the land: *Maharry v. Maharry*, (Okl.) 47 Pac. Rep. 1051. An action will also lie in favor of the wife for damages against one who induces and aids her husband to leave the state to avoid the payment of alimony: *Hoefler v. Hoefler*, 42 N. Y. Suppl. 1035; and the court may, in a proper case, proceed against a husband who has conveyed his property in anticipation of divorce, for contempt in failing to obey the

decree for the payment of alimony : *Stuart v. Stuart*, 123 Mass. 370.

- **5. Remedies—Restraint of Alienation—Lien.**—On application of the wife, the court may grant an order, pending the suit for divorce, restraining the defendant from alienating his property : *In re White*, 113 Cal. 282 ; *Ricketts v. Ricketts*, 4 Gill, (Md.) 105 ; *Gibson v. Gibson*, 46 Wis. 449 ; see *supra*, p. 385 ; and when such an injunction is granted, it will make the wife's claim for alimony a lien on the property prior to that of any other and even judgment creditors : *Vanzant v. Vanzant*, 23 Ill. 536 ; and will render a conveyance thereof void as to her : *Uhl v. Irwin*, 3 Okl. 388. So, when the court charges the alimony as a lien on the husband's real estate, it will attach to real estate fraudulently conveyed by him before the suit for divorce was brought : *Foster v. Foster*, 56 Vt. 540 ; and to land held by him under a contract of purchase, which he assigns to a purchaser with notice : *Glick v. Glick*, (Mich.) 68 N. W. Rep. 153 ; and its lien may be expressly made prior to that of a mortgage given in fraud of alimony : *Gardenhire v. Gardenhire*, 2 Okl. 484.

Injunction—Criminal Acts—Labor Unions—Conspiracy to Injure Business.

VEGELAHN *v.* GUNTNER ET AL.

(Supreme Judicial Court of Massachusetts. October 27, 1896.)

(44 N. E. Rep. 1077.)

The maintenance of a patrol of two men in front of plaintiff's premises, in furtherance of a conspiracy to prevent, whether by threats and intimidation or by persuasion and social pressure, any workmen from entering into or continuing in his employment, will be enjoined, though such workmen are not under contract to work for plaintiff. FIELD, C. J., and HOLMES, J., dissenting.

A continuing injury to property or business may be enjoined, though it be also punishable as a crime.

Report from Supreme Judicial Court, Suffolk county;
OLIVER WENDELL HOLMES, Judge.

Bill by Frederick O. Vegelahn against George M. Guntner and others for an injunction. An injunction was awarded, which, on report to the full court, was modified so as to conform to the original injunction issued *pendente lite*.

Hale & Dickerman, for plaintiff.

Thomas H. Russell and *Arthur H. Russell*, for respondents.

ALLEN, J.—The principal question in this case is whether the defendants should be enjoined against maintaining the patrol. The report shows that, following upon a strike of the plaintiff's workmen, the defendants conspired to prevent him from getting workmen, and thereby to prevent him from carrying on his business, unless and until he should adopt a certain schedule of prices. The means adopted were persuasion and social pressure, threats of personal injury or unlawful harm conveyed to persons employed or seeking employment, and a patrol of two men in front of the plaintiff's factory, maintained from half-past six in the morning till half-past five in the afternoon, on one of the busiest streets of Boston. The number of men was greater at times, and at times showed some little disposition to stop the plaintiff's door. The patrol proper at times went further than simple advice, not obtruded beyond the point where the other person was willing to listen; and it was found that the patrol would probably be continued if not enjoined. There was also some evidence of persuasion to break existing contracts. The patrol was maintained as one of the means of carrying out the defendants' plan, and it was used in combination with social pressure, threats of personal injury or unlawful harm and persua-

sion to break existing contracts. It was thus one means of intimidation, indirectly to the plaintiff and directly to persons actually employed, or seeking to be employed, by the plaintiff, and of rendering such employment unpleasant or intolerable to such persons. Such an act is an unlawful interference with the rights both of employer and of employed. An employer has a right to engage all persons who are willing to work for him at such prices as may be mutually agreed upon, and persons employed or seeking employment have a corresponding right to enter into or remain in the employment of any person or corporation willing to employ them. These rights are secured by the constitution itself: *Com. v. Perry*, 155 Mass. 117, 28 N. E. Rep. 1126; *People v. Gillson*, 109 N. Y. 389, 17 N. E. Rep. 343; *Braceville Coal Co. v. People*, 147 Ill. 66, 35 N. E. Rep. 62; *Ritchie v. People*, 155 Ill. 98, 40 N. E. Rep. 454; *Low v. Printing Co.*, (Neb.) 59 N. W. Rep. 362. No one can lawfully interfere by force or intimidation to prevent employers or persons employed or wishing to be employed from the exercise of these rights. It is in Massachusetts, as in some other states, even made a criminal offence for one, by intimidation or force, to prevent, or seek to prevent, a person from entering into or continuing in the employment of a person or corporation: Pub. St. c. 74, § 2. Intimidation is not limited to threats of violence or of physical injury to person or property. It has a broader signification, and there also may be a moral intimidation which is illegal. Patrolling or picketing, under the circumstances stated in the report, has elements of intimidation like those which were found to exist in *Sherry v. Perkins*, 147 Mass. 212, 17 N. E. Rep. 307. It was declared to be unlawful in *Reg. v. Druitt*, 10 Cox, Cr. Cas. 592; *Reg. v. Hibbert*, 13 Cox, Cr. Cas. 82; *Reg. v. Bauld*, *Id.* 282. It was assumed to be unlawful in *Trollope v. Trader's Fed.*, [1875], 11 T. L. R. 228, though in that case the pickets were withdrawn before the bringing of the bill. The patrol was an unlawful inter-

ference both with the plaintiff and with the workmen within the principle of many cases; and when instituted for the purpose of interfering with his business, it became a private nuisance. See *Carew v. Rutherford*, 106 Mass. 1; *Walker v. Cronin*, 107 Mass. 555; *Barr v. Trades Council*, (N. J. Ch.) 30 Atl. Rep. 881; *Murdock v. Walker*, 152 Pa. St. 595, 25 Atl. Rep. 492; *China Co. v. Brown*, 164 Pa. St. 449, 30 Atl. Rep. 261; *Coeur D'Alene Consol. & Min. Co. v. Miners' Union of Wardner*, 51 Fed. Rep. 260; *Temperton v. Russell*, [1893] 1 Q. B. 715; *Flood v. Jackson*, [1895] 2 Q. B. 21; *Wright v. Hennessey*, 52 Alb. Law J. 104, (a case before Baron POLLOCK;) *Judge v. Bennett*, 36 Wkly. Rep. 103; *Lyons v. Wilkins*, [1896] 1 Ch. 811.

The defendants contend that these acts were justifiable, because they were only seeking to secure better wages for themselves by compelling the plaintiff to accept their schedule of wages. This motive or purpose does not justify maintaining a patrol in front of the plaintiff's premises as a means of carrying out their conspiracy. A combination among persons merely to regulate their own conduct is within allowable competition, and is lawful, although others may be indirectly affected thereby. But a combination to do injurious acts expressly directed to another, by way of intimidation or constraint, either of himself or of persons employed or seeking to be employed by him, is outside of allowable competition, and is unlawful. Various decided cases fall within the former class; for example: *Worthington v. Waring*, 157 Mass. 421, 32 N. E. Rep. 744; *Snow v. Wheeler*, 113 Mass. 179; *Bowen v. Matheson*, 14 Allen, (Mass.) 499; *Com. v. Hunt*, 4 Metc. (Mass.) 111; *Heywood v. Tillson*, 75 Me. 225; *Cote v. Murphy*, 159 Pa. St. 420, 28 Atl. Rep. 190; *Bohn Mfg. Co. v. Hollis*, 54 Minn. 223, 55 N. W. Rep. 1119; *Steamship Co. v. McGregor*, [1892] App. Cas. 25; *Curran v. Treleaven*, [1891] 2 Q. B. 545, 561, 17 Cox, Cr. Cas. 354. The present case falls within the latter class.

Nor does the fact that the defendants' acts might subject them to an indictment prevent a court of equity from issuing an injunction. It is true that, ordinarily, a court of equity will decline to issue an injunction to restrain the commission of a crime; but a continuing injury to property or business may be enjoined, although it may also be punishable as a nuisance or other crime: *Sherry v. Perkins*, 147 Mass. 212, 17 N. E. Rep. 307; *In re Debs*, 158 U. S. 564, 593, 599, 15 Sup. Ct. Rep. 900; *Baltimore & P. R. Co. v. Fifth Baptist Church*, 108 U. S. 317, 329, 2 Sup. Ct. Rep. 719; *Cranford v. Tyrrell*, 128 N. Y. 341, 344, 28 N. E. Rep. 514; *Gilbert v. Mickle*, 4 Sandf. Ch. (N. Y.) 357; *Port of Mobile v. Louisville & N. R. Co.*, 84 Ala. 115, 126, 4 So. Rep. 106; *Arthur v. Oakes*, 11 C. C. A. 209, 63 Fed. Rep. 310; *Toledo, A. A. & N. M. Ry. Co. v. Pennsylvania Co.*, 54 Fed. Rep. 730, 744; *Emperor of Austria v. Day*, 3 De Gex, F. & J. 217, 239, 240, 253; *Hermann Loog v. Bean*, 26 Ch. Div. 306, 314, 316, 317; *Monson v. Tussaud*, [1894] 1 Q. B. 671, 689, 690, 698.

A question is also presented whether the court should enjoin such interference with persons in the employment of the plaintiff who are not bound by contract to remain with him, or with persons who are not under any existing contract, but who are seeking or intending to enter into his employment. A conspiracy to interfere with the plaintiff's business by means of threats and intimidation, and by maintaining a patrol in front of his premises, in order to prevent persons from entering his employment, or in order to prevent persons who are in his employment from continuing therein, is unlawful, even though such persons are not bound by contract to enter into or to continue in his employment; and the injunction should not be so limited as to relate only to persons who are bound by existing contracts: *Walker v. Cronin*, 107 Mass. 555, 565; *Carew v. Rutherford*, 106 Mass. 1; *Sherry v. Perkins*, 147 Mass. 212, 17 N. E. Rep. 307; *Temperton v. Russell*, [1893] 1 Q. B.

715, 728, 731; *Flood v. Jackson*, [1895] 2 Q. B. 21. We therefore think that the injunction should be in the form as originally issued. So ordered.

FIELD, C. J. (dissenting.)—The practice of issuing injunctions in cases of this kind is of very recent origin. One of the earliest authorities in the United States for enjoining, in equity, acts somewhat like those alleged against the defendants in the present case, is *Sherry v. Perkins*, (decided in 1888,) 147 Mass. 212, 17 N. E. Rep. 307. It was found as a fact in that case that the defendants entered into a scheme, by threats and intimidation, to prevent persons in the employment of the plaintiffs as lasters from continuing in such employment, and, in like manner, to prevent other persons from entering into such employment as lasters; that the use of the banners was a part of the scheme; that the first banner was carried from January 8, 1887, to March 22, 1887, and the second banner from March 22, 1887, to the time of the hearing, and that “the plaintiffs have been and are injured in their business and property thereby.” The full court say: “The act of displaying banners with devices, as a means of threats and intimidation to prevent persons from entering into or continuing in the employment of the plaintiffs, was injurious to the plaintiffs and illegal at common law and by statute: Pub. St. c. 74, § 2; *Walker v. Cronin*, 107 Mass. 555.” “The banner was a standing menace to all who were or wished to be in the employment of the plaintiffs, to deter them from entering the plaintiffs’ premises. Maintaining it was a continuous unlawful act, injurious to plaintiffs’ business and property, and was a nuisance such as a court of equity will grant relief against: *Gilbert v. Mickle*, 4 Sandf. Ch. (N. Y.) 357; *Spinning Co. v. Riley*, 6 L. R. Eq. 551.” *Gilbert v. Mickle*, one of the authorities cited in *Sherry v. Perkins*, was a suit in equity by an auctioneer against the mayor of the city of New York to restrain him and those acting under him from

parading, placing or keeping before the plaintiff's auction rooms a placard as follows: "Strangers, beware of mock auctions." A temporary injunction was issued, but, on hearing, it was dissolved. Notwithstanding what is said in the opinion of the vice chancellor, his conclusion is as follows: "I am satisfied that it is my duty to leave the party to his remedy by an action at law." *Spinning Co. v. Riley* is a well-known decision of Vice Chancellor MALINS. The bill prayed that the defendants might be "restrained from printing or publishing any placards or advertisements similar to those already set forth." The defendants had caused to be posted on the walls and other public places in the neighborhood of the plaintiff's works, and caused to be printed in certain newspapers, a notice as follows: "Wanted all well-wishers to the Operative Cotton Spinning, &c., Association not to trouble or cause any annoyance to the Springhead Spinning Company, Lees, by knocking at the door of their office, until the dispute between them and the self-actor minders is finally terminated. By special order. Carrodus, 32 Greaves Street, Oldham." The case was heard upon demurrers. The vice chancellor says: "For the reasons I have stated I overruled these demurrers, because the bill states and the demurrers admit acts amounting to the destruction of property." Of this case the court, in *Sherry v. Perkins*, say: "Some of the language in *Spinning Co. v. Riley* has been criticised, but the decision has not been overruled." The cases are there cited in which that decision has been doubted or criticised. Of that decision this court, in *Boston Diatite Co. v. Florence Mfg. Co.*, 114 Mass. 69, say: "The opinions of Vice Chancellor MALINS in *Spinning Co. v. Riley*, 6 L. R. Eq. 551, in *Dixon v. Holden*, 7 L. R. Eq. 488, and in *Rollins v. Hinks*, 13 L. R. Eq. 355, appear to us to be so inconsistent with these authorities, [authorities which the court had cited,] and with well-settled principles, that it would be superfluous to consider whether, upon the facts before him,

his decisions can be supported." Much the same language was used by the justices in *Assurance Co. v. Knott*, 10 L. R. Ch. 142, a part of the head-note of which is: "*Dixon v. Holden and Spinning Co. v. Riley* overruled." In *Temper-ton v. Russell*, [1893] 1 Q. B. 435, 438, LINDLEY, L. J., says of the case of *Spinning Co. v. Riley* that it was overruled by the court of appeal in *Assurance Co. v. Knott*. Since the judicature act, however, the courts of England have interfered to restrain, by injunction, the publication or continued publication of libelous statements, particularly those injuriously affecting the business or property of another, as well as injunctions similar to that in the present case: St. 36 & 37 Vict. c. 66, § 25, subds. 5, 8; *Monson v. Tussaud*, [1894] 1 Q. B. 671, 672; *Lyons v. Wilkins*, [1896] 1 Ch. 811, 827. But, in the absence of any power given by statute, the jurisdiction of a court of equity, having only the powers of the English high court of chancery, does not, I think, extend to enjoining acts like those complained of in the case at bar, unless they amount to a destruction or threatened destruction of property, or an irreparable injury to it. In England the rights of employers and employed with reference to strikes, boycotts and other similar movements have not, in general, been left to be worked out by the courts from common-law principles, but statutes, from time to time, have been passed defining what may and what may not be permitted. The administration of these statutes largely has been through the criminal courts.

As a means of prevention, the remedy given by Pub. St. c. 74, § 2, would seem to be adequate where the section is applicable, unless the destruction of, or an irreparable injury to, property is threatened; and there is the additional remedy of an indictment for a criminal conspiracy at common law, if the acts of the defendant amount to that. If the acts complained of do not amount to intimidation or force, it is not in all respects clear what are lawful and

what are not lawful at common law. It seems to be established in this commonwealth that, intentionally and without justifiable cause, to entice, by persuasion, a workman to break an existing contract with his employer, and to leave his employment, is actionable, whether done with actual malice or not: *Walker v. Cronin*, 107 Mass. 555. What constitutes justifiable cause remains in some respects undetermined. Whether to persuade a person who is free to choose his employment not to enter into the employment of another person gives a cause of action to such other person, by some courts has been said to depend upon the question of actual malice; and, in considering this question of malice, it is said that it is important to determine whether the defendant has any lawful interest of his own in preventing the employment, such as that of competition in business. For myself, I have been unable to see how malice is necessarily decisive. To persuade one man not to enter into the employment of another, by telling the truth to him about such other person and his business, I am not convinced is actionable at common law, whatever the motive may be. Such persuasion, when accompanied by falsehood about such other person or his business, may be actionable, unless the occasion of making the statements is privileged; and then the question of actual malice may be important. This, I think, is the effect of the decision in *Rice v. Albee*, 164 Mass. 88, 41 N. E. Rep. 122. When one man orally advises another not to enter into a third person's employment, it would, I think, be a dangerous principle to leave his liability to be determined by a jury upon the question of his malice or want of malice, except in those cases where the words spoken were false. In the present case, if the establishment of a patrol is using intimidation or force, within the meaning of our statute, it is illegal and criminal. If it does not amount to intimidation or force, but is carried to such a degree as to interfere with the use by the plaintiff of his property, it may be illegal

and actionable. But something more is necessary to justify issuing an injunction. If it is in violation of any ordinance of the city regulating the use of streets, there may be a prosecution for that, and the police can enforce the ordinance; but if it is merely a peaceful mode of finding out the persons who intend to enter the plaintiff's premises to apply for work, and of informing them of the actual facts of the case, in order to induce them not to enter the plaintiff's employment, in the absence of any statute relating to the subject, I doubt if it is illegal, and I see no ground for issuing an injunction against it.

As no objection is now made by the defendants to the equitable jurisdiction, I am of opinion on the facts reported, as I understand them, that the decree entered by Mr. Justice HOLMES should be affirmed, without modification.

HOLMES, J. (dissenting.)—In a case like the present, it seems to me that, whatever the true result may be, it will be of advantage to sound thinking to have the less popular view of the law stated, and therefore, although, when I have been unable to bring my brethren to share my convictions, my almost invariable practice is to defer to them in silence, I depart from that practice in this case, notwithstanding my unwillingness to do so, in support of an already rendered judgment of my own.

In the first place, a word or two should be said as to the meaning of the report. I assume that my brethren construe it as I meant it to be construed, and that, if they were not prepared to do so, they would give an opportunity to the defendants to have it amended in accordance with what I state my meaning to have been. There was no proof of any threat or danger of a patrol exceeding two men, and as, of course, an injunction is not granted except with reference to what there is reason to expect in its absence, the question on that point is whether a patrol of two men should be enjoined. Again, the defendants are enjoined by the final

decree from intimidating by threats, express or implied, of physical harm to body or property, any person who may be desirous of entering into the employment of the plaintiff, so far as to prevent him from entering the same. In order to test the correctness of the refusal to go further, it must be assumed that the defendants obey the express prohibition of the decree. If they do not, they fall within the injunction as it now stands, and are liable to summary punishment. The important difference between the preliminary and the final injunction is that the former goes further, and forbids the defendants to interfere with the plaintiff's business "by any scheme . . . organized for the purpose of . . . preventing any person or persons who now are or may hereafter be . . . desirous of entering the [plaintiff's employment] from entering it." I quote only a part, and the part which seems to me most objectionable. This includes refusal of social intercourse, and even organized persuasion or argument, although free from any threat of violence, either express or implied. And this is with reference to persons who have a legal right to contract or not to contract with the plaintiff, as they may see fit. Interference with existing contracts is forbidden by the final decree. I wish to insist a little that the only point of difference which involves a difference of principle between the final decree and the preliminary injunction, which it is proposed to restore, is what I have mentioned, in order that it may be seen exactly what we are to discuss. It appears to me that the opinion of the majority turns in part on the assumption that the patrol necessarily carries with it a threat of bodily harm. That assumption I think unwarranted, for the reasons which I have given. Furthermore, it cannot be said, I think, that two men, walking together up and down a sidewalk, and speaking to those who enter a certain shop, do necessarily and always thereby convey a threat of force. I do not think it possible to discriminate, and to say, that two workmen, or even two representatives of an organization of

workmen, do; especially when they are, and are known to be, under the injunction of this court not to do so. See Stimson, Labor Law, § 60, especially pages 290, 298-300; Reg. v. Shepherd, 11 Cox, Cr. Cas. 325. I may add that I think the more intelligent workingmen believe as fully as I do that they no more can be permitted to usurp the state's prerogative of force than can their opponents in their controversies. But, if I am wrong, then the decree as it stands reaches the patrol, since it applies to all threats of force. With this I pass to the real difference between the interlocutory and the final decree.

I agree, whatever may be the law in the case of a single defendant, (*Rice v. Albee*, 164 Mass. 88, 41 N. E. Rep. 122,) that when a plaintiff proves that several persons have combined and conspired to injure his business, and have done acts producing that effect, he shows temporal damage and a cause of action, unless the facts disclose or the defendants prove some ground of excuse or justification; and I take it to be settled, and rightly settled, that doing that damage by combined persuasion is actionable, as well as doing it by falsehood or by force: *Walker v. Cronin*, 107 Mass. 555; *Morasse v. Brochu*, 151 Mass. 567, 25 N. E. Rep. 74; *Tasker v. Stanley*, 153 Mass. 148, 26 N. E. Rep. 417.

Nevertheless, in numberless instances the law warrants the intentional infliction of temporal damage, because it regards it as justified. It is on the question of what shall amount to a justification, and more especially on the nature of the considerations which really determine or ought to determine the answer to that question, that judicial reasoning seems to me often to be inadequate. The true grounds of decision are considerations of policy and of social advantage, and it is vain to suppose that solutions can be attained merely by logic and general propositions of law which nobody disputes. Propositions as to public policy rarely are unanimously accepted, and still more rarely, if

ever, are capable of unanswerable proof. They require a special training to enable any one even to form an intelligent opinion about them.

In the early stages of law, at least, they generally are acted on rather as inarticulate instincts than as definite ideas, for which a rational defence is ready.

To illustrate what I have said in the last paragraph: It has been the law for centuries that a man may set up a business in a small country town, too small to support more than one, although thereby he expects and intends to ruin some one already there, and succeeds in his intent. In such a case he is not held to act "unlawfully and without justifiable cause," as was alleged in *Walker v. Cronin* and *Rice v. Albee*. The reason, of course, is that the doctrine generally has been accepted that free competition is worth more to society than it costs, and that on this ground the infliction of the damage is privileged: *Com. v. Hunt*, 4 Metc. (Mass.) 111, 134. Yet even this proposition nowadays is disputed by a considerable body of persons, including many whose intelligence is not to be denied, little as we may agree with them.

I have chosen this illustration partly with reference to what I have to say next. It shows without the need of further authority that the policy of allowing free competition justifies the intentional inflicting of temporal damage, including the damage of interference with a man's business by some means, when the damage is done, not for its own sake, but as an instrumentality in reaching the end of victory in the battle of trade. In such a case it cannot matter whether the plaintiff is the only rival of the defendant, and so is aimed at specially, or is one of a class all of whom are hit. The only debatable ground is the nature of the means by which such damage may be inflicted. We all agree that it cannot be done by force or threats of force. We all agree, I presume, that it may be done by persuasion to leave a

rival's shop, and come to the defendant's. It may be done by the refusal or withdrawal of various pecuniary advantages, which, apart from this consequence, are within the defendant's lawful control. It may be done by the withdrawal of, or threat to withdraw, such advantages from third persons who have a right to deal or not to deal with the plaintiff, as a means of inducing them not to deal with him either as customers or servants: *Com. v. Hunt*, 4 Metc. (Mass.) 111, 112, 133; *Bowen v. Matheson*, 14 Allen, (Mass.) 499; *Heywood v. Tillson*, 75 Me. 225; *Steamship Co. v. McGregor*, [1892] App. Cas. 25. I have seen the suggestion made that the conflict between employers and employed was not competition. But I venture to assume that none of my brethren would rely on that suggestion. If the policy on which our law is founded is too narrowly expressed in the term "free competition," we may substitute "free struggle for life." Certainly, the policy is not limited to struggles between persons of the same class, competing for the same end. It applies to all conflicts of temporal interests.

I pause here to remark that the word "threats" often is used as if, when it appeared that threats had been made, it appeared that unlawful conduct had begun. But it depends on what you threaten. As a general rule, even if subject to some exceptions, what you may do in a certain event you may threaten to do—that is, give warning of your intention to do—in that event, and thus allow the other person the chance of avoiding the consequence. So, as to "compulsion," it depends on how you "compel:" *Com. v. Hunt*, 4 Metc. (Mass.) 111, 133. So as to "annoyance" or "intimidation:" *Connor v. Kent*, *Curran v. Treleaven*, [1891] 2 Q. B. 545, 17 Cox, Cr. Cas. 354, 367, 368, 370. In *Sherry v. Perkins*, 147 Mass. 212, 17 N. E. Rep. 307, it was found as a fact that the display of banners which was enjoined was part of a scheme to prevent workmen from entering or remaining in the plaintiff's employment, "by threats

and intimidation." The context showed that the words as there used meant threats of personal violence and intimidation by causing fear of it.

So far, I suppose, we are agreed. But there is a notion, which latterly has been insisted on a good deal, that a combination of persons to do what any one of them lawfully might do by himself will make the otherwise lawful conduct unlawful. It would be rash to say that some as yet unformulated truth may not be hidden under this proposition. But, in the general form in which it has been presented and accepted by many courts, I think it plainly untrue, both on authority and principle: *Com. v. Hunt*, 4 Metc. (Mass.) 111; *Randall v. Hazeltan*, 12 Allen, (Mass.) 412, 414. There was combination of the most flagrant and dominant kind in *Bowen v. Matheson*, and in the *Steamship Co.* case, and combination was essential to the success achieved. But it is not necessary to cite cases. It is plain from the slightest consideration of practical affairs, or the most superficial reading of industrial history, that free competition means combination, and that the organization of the world, now going on so fast, means an ever-increasing might and scope of combination. It seems to me futile to set our faces against this tendency. Whether beneficial on the whole, as I think it, or detrimental, it is inevitable, unless the fundamental axioms of society, and even the fundamental conditions of life, are to be changed.

One of the eternal conflicts out of which life is made up is that between the effort of every man to get the most he can for his services, and that of society, disguised under the name of capital, to get his services for the least possible return. Combination on the one side is patent and powerful. Combination on the other is the necessary and desirable counterpart, if the battle is to be carried on in a fair and equal way. I am unable to reconcile *Temperton v. Russell*, [1893] 1 Q. B. 715, and the cases which follow it, with the

Steamship Co. case. But *Temperton v. Russell* is not a binding authority here, and therefore I do not think it necessary to discuss it.

If it be true that workingmen may combine with a view, among other things, to getting as much as they can for their labor, just as capital may combine with a view to getting the greatest possible return, it must be true that, when combined, they have the same liberty that combined capital has, to support their interests by argument, persuasion, and the bestowal or refusal of those advantages which they otherwise lawfully control. I can remember when many people thought that, apart from violence or breach of contract, strikes were wicked, as organized refusals to work. I suppose that intelligent economists and legislators have given up that notion to-day. I feel pretty confident that they equally will abandon the idea that an organized refusal by workmen of social intercourse with a man who shall enter their antagonist's employ is unlawful, if it is dissociated from any threat of violence, and is made for the sole object of prevailing, if possible, in a contest with their employer about the rate of wages. Indeed, the question seems to me to have been decided as long ago as 1842, by the good sense of Chief Justice SHAW, in *Com. v. Hunt*, 4 Metc. (Mass.) 111. I repeat at the end, as I said at the beginning, that this is the point of difference in principle, and the only one, between the interlocutory and final decree; and I only desire to add that the distinctions upon which the final decree was framed seem to me to have coincided very accurately with the results finally reached by legislation and judicial decision in England, apart from what I must regard as the anomalous decisions of *Temperton v. Russell* and the cases which have followed it: *Reg. v. Shepherd*, 11 Cox, Cr. Cas. 325; *Connor v. Kent*, *Gibson v. Lawson*, and *Curran v. Treleaven*, [1891] 2 Q. B. 545, 17 Cox, Cr. Cas. 354.

The general question of the propriety of dealing with this kind of case by injunction I say nothing about, because I

understand that the defendants have no objection to the final decree if it goes no further, and that both parties wish a decision upon the matters which I have discussed.

There is a note on this subject, in the second volume of this series, p. 401, *et seq.*

Injunction—Public Officers—Constitutional Amendment—Submission to Voters.

STATE EX REL. CRANMER v. THORSON, SECRETARY
OF STATE.

(Supreme Court of South Dakota. July 29, 1896.)

(68 N. W. Rep. 202.)

Under Laws 1891, c. 57, § 12, providing that "whenever any proposed constitution or constitutional amendment or other question is to be submitted to the people of the state for popular vote, the secretary of state shall . . . certify the same to the auditor of each county in the state," it is the duty of the secretary to certify a question directed by the legislature as to whether a provision of the constitution shall be repealed, though an affirmative answer by the people would not affect the constitution.

Injunction will not lie at the instance of a taxpayer and elector to enjoin the submission to the vote of the people of a constitutional amendment because the submission is invalid, as such taxpayer would receive no substantial injury from such submission.

Courts have no jurisdiction to prevent the submission to the people, as directed by the legislature, of a question involving an amendment to the constitution, by enjoining the secretary of state from certifying the question to the county auditors, as such action would be an unwarranted interference with the legislative authority.

Suit on the relation of S. H. Cranmer against Thomas Thorson, as Secretary of State of South Dakota, for an injunction.

S. H. Cranmer, in pro. per.

John E. Carland, for defendant.

HANEY, J.—This action was commenced in this court for the purpose of enjoining defendant, as secretary of state, from certifying to the auditors of the state the question contained in the following joint resolution passed at the last session of the legislature, an engrossed copy of which is now on file in this office :

“House joint resolution proposing an amendment to the constitution. A joint resolution to amend the constitution of the state of South Dakota by repealing article 24 thereof relating to prohibition, and submitting the same to a vote of the people.

“Be it resolved by the house of representatives of the state of South Dakota, the senate concurring: Section 1. Question submitted. That at the general election to be held in the state of South Dakota on the first Tuesday after the first Monday in November, 1896, there shall be submitted to a vote of the qualified electors of the state of South Dakota the following question: ‘Shall article twenty-four of the constitution be repealed?’ ” Laws 1895, c. 38.

After filing certain objections to the issuance of a restraining order, pending litigation, defendant answered, evidence was introduced on behalf of the relator, and the cause was heard and submitted, a decision upon defendant’s objections being reserved for consideration with the case upon its merits. The relator is an elector and taxpayer. Defendant intends to, and will, unless restrained by injunction or other legal process, certify the question as a proposed constitutional amendment. The relator contends that the passage of the resolution, and the submission of the question embraced therein, are steps in an attempt to amend the state constitution; that the methods prescribed for its amendment have not been complied with; therefore defendant has no authority to certify the same. His argu-

ment rests upon the theory that the secretary is only authorized to certify proposed amendments. He claims the legislature did not itself agree to any amendment; that it merely resolved to ask the qualified electors of the state a certain question, and that the constitution will not be changed whatever reply may be returned. The fallacy of this argument results from a misconception of defendant's official duty. Such duty is thus defined: "Whenever a proposed constitution or constitutional amendment, or other question, is to be submitted to the people of the state for popular vote, the secretary of state shall duly, and not less than thirty days before election, certify the same to the auditor of each county in the state, and the auditor of each county shall include the same in the publication provided for in section 10 of this act. Questions to be submitted to the people of a county or municipality shall be advertised as provided of nominees for office by said election:" Laws 1891, c. 57, § 12. Whether the joint resolution be regarded as embodying a proposed amendment or some other question to be submitted to the people of the state, the statute requires that it be certified in the same manner. The court is aware of no law prohibiting the legislature from submitting any question its wisdom may suggest. It may submit a question not intended to change the organic law. Whenever it directs any question to be submitted, it is the duty of the secretary to certify it, and it is wholly immaterial whether that officer considers that it involves an amendment of the constitution or not. Manifestly, then, it is his duty to certify the question in this joint resolution, even if an affirmative reply by the electors will not affect any part of the constitution, and this court should not prevent him from performing his official duty. But there are other, perhaps more convincing, reasons why the injunction should not issue in this action. Because this court has power to issue writs of *mandamus*, *quo warranto*, *certiorari*, injunction and other original and remedial

writs, with authority to hear and determine the same, in such cases and under such regulations as may be provided by law, (Const. art. 5, § 3,) it does not follow that it has jurisdiction to issue an injunction upon any and all occasions. It is clothed with all the powers of a court of equity as understood and defined when the constitution was adopted, but its jurisdiction is limited to such matters as were then of recognized equitable cognizance. Although in most instances its decrees are final, and not reviewable, it is subject to the law to which the conscience of its judges must yield ready obedience, however ample may be their physical ability or opportunities to successfully disregard it. Then, assuming the resolution involves a proposed amendment, it becomes the duty of the court to determine in the first instance, and on its own motion, because jurisdiction cannot be conferred even by consent, whether it has power to hear and determine the defendant's right to perform the proposed official action. It is a familiar principle that substantial and positive injury must always be made to appear to the satisfaction of a court before it will grant an injunction, and acts which, however irregular and unauthorized, can have no injurious results, constitute no ground for relief: 1 High, Inj. § 9. The party seeking an injunction must show, not only a clear legal right, but a well-grounded apprehension of immediate injury. An injunction will not be granted where the injury is doubtful, or the violation of complainant's rights is merely speculative. Injury material and actual, not fanciful or theoretical, or merely possible, must be shown as the necessary or probable result of the action to be restrained. It is not sufficient to allege simply that the party will suffer irreparable injury, but he must set out the facts so that the court may determine the necessity for its intervention: 1 Beach, Mod. Eq. Jur. §§ 641, 642. The complainant who seeks an injunction must be able to specify some particular act, the performance of which will damnify him, and it is such act alone that he can restrain. This

court has no power to examine an act of the legislature generally and declare it unconstitutional. The limit of our authority in this respect is to disregard, as in violation of the constitution, any act or part of an act which stands in the way of the legal rights of the suitor before us; but a suitor who calls upon a court of chancery to arrest the performance of a duty imposed by the legislature upon a public officer must show conclusively not only that the act about to be performed is unconstitutional, but also that it will inflict a direct injury upon him: *Gibbs v. Green*, 54 Miss. 592. It has not been shown, nor can it be imagined, in what manner the relator will be injured by the contemplated action of defendant. If the legislature has proceeded properly and its proposed amendment shall be ratified by the people, the relator will have no legal cause of complaint, because, as a good citizen of the state, he will be bound to cheerfully accept the lawfully expressed will of a majority of its sovereign electors. If, on the other hand, the action of the legislature was such as to render any answer to the question inoperative, the constitution will not be modified and no one will be affected. Any additional burden which might result to relator, as a taxpayer, by reason of submitting this question at a general election, is too trifling, fanciful and speculative for serious consideration; and if, as claimed by him, the legislature has done nothing but submit a question to the people, it has done what it had a right to do, and any additional expense resulting from such action will be a legitimate expenditure of public money. Evidently an essential ground of equitable jurisdiction is wanting. Having failed to show that he will be injured by the intended action of defendant, the relator is not entitled to have it enjoined, or its regularity investigated, in this action. This was one of the objections urged by the learned counsel for defendant in opposition to the issuance of a restraining order pending litigation. It was well taken, and applies with equal force to the issuance of a permanent injunction.

There is another view, which involves the structure of the state government and the relation of its several departments. Should it be conceded that the relator has such an interest in the matter as entitles him to be heard, or that the action involves a question of such public concern as would warrant an attempt by the attorney general to obtain an injunction, could this court issue it? No precedent for such action has been presented by counsel or discovered by the court. In discussing this phase of the case it will be assumed an amendment of the constitution was intended requiring the concurrent action of the legislature and electors. The former has acted. Its action will be communicated to the latter by means of defendant's certificate. Until the latter shall have expressed their approval, the proceeding is incomplete, and the constitution will remain unchanged. The proposed amendment is on its way to the electors. Can this court, at this time, impede its progress? Can it be called upon to anticipate conditions which may never exist? Can it interpose its process between the legislature and electors, who are alone clothed with power to modify the fundamental law, before both have acted, and while the matter is pending and incomplete? The powers of the state government are divided into three distinct departments—the legislative, executive and judicial. The powers and duties of each are prescribed by the constitution: Const. art. 2. Power to amend the constitution belongs exclusively to the legislature and electors. It is legislation of the most important character. This court has power to determine what such legislation is, what the constitution contains, but not what it should contain. It has power to determine what statutory laws exist, and whether or not they conflict with the constitution; but it cannot say what laws shall or shall not be enacted. It has the power, and it is its duty, whenever the question arises in the usual course of litigation, wherein the substantial rights of any actual litigant are involved, to decide whether any statute

has been legally enacted, or whether any change in the constitution has been legally effected, but it will hardly be contended that it can interpose in any case to restrain the enactment of an unconstitutional law: *Mississippi v. Johnson*, 4 Wall. 475, 500. If the legislature cannot be enjoined when engaged in the enactment of unconstitutional statutes, it and the electors cannot be enjoined when engaged in an unwarranted attempt to amend the constitution. To issue an injunction in this action would be to enjoin the legislature and electors in the exercise of their legislative duty. Suppose a bill, having passed the legislature, is in possession of the governor, or, to make the analogy more nearly complete, suppose it is being conveyed to the executive by an officer of the legislature, would any one imagine the progress of the messenger could be arrested by an injunction? The inquiry answers itself. Is there any distinction in principle or reason between such a case and the case under discussion? Clearly none. An injunction cannot be granted to prevent a legislative act by a municipal corporation: *Comp. Laws*, § 4650. The Code expresses the settled doctrine in this respect: *Spell. Extr. Relief*, § 688. If courts cannot interfere with the legislative proceedings of a city council, they certainly cannot with like proceedings in the legislature itself. If they cannot prevent the legislature from enacting unconstitutional laws, they cannot prevent it and the electors from making ineffectual efforts to amend the constitution. The fact that the present attempt is without precedent is of much weight against it: *Mississippi v. Johnson*, *supra*. In Indiana it was the duty of the secretary of state to deliver certain certificates and returns, contained in sealed packages, to the speaker of the house of representatives. On the claim that the certificates were wrongful and illegal, an action was begun to enjoin their delivery. The supreme court of that state decided that the court was without jurisdiction. Its opinion contains much that is pertinent to the case at bar. We quote the following: "The question which

faces us at the threshold is one of controlling influence, and the answer to it must rule our decision. The question of jurisdiction is always one of importance, but in no case is it more important than where, as here, the extraordinary remedy of injunction is invoked to control the acts of officers holding high places in the government of the state. In cases like this, where the judicial department is asked to enjoin an officer of a different branch of the government from performing an official act, the question is always one of dominating force, and sometimes of perplexing difficulty. On the one hand, no consideration of policy or convenience should induce the courts to assume to exercise a power that does not belong to them, nor, on the other hand, should any consideration of that kind, or of any kind, induce them to surrender a power which it is their duty to exercise. The assumption of a power not vested in them would be a violation of the constitution, since it would be a usurpation of a power conferred upon another branch of the government. It would disturb the system of checks and balances which the constitution has so carefully constructed, and which the courts have ever guarded with most scrupulous care. The question is as important as any that the courts encounter in the whole range of judicial investigation, and it is always regarded as one of great delicacy, to be considered with care and disposed of with caution. The question of jurisdiction is never in any case a technical or subordinate one, and certainly it is not so in the one before us. . . . Many cases assert that courts cannot control by injunction, or by any other writ, the exercise of a purely legislative or executive power: *Railroad Co. v. Lowry*, 61 Miss. 102; *Hawkins v. Governor*, 1 Ark. 570; *State v. Drew*, 17 Fla. 67; *State v. Towns*, 8 Ga. 360; *People v. Bissell*, 19 Ill. 229; *People v. Yates*, 40 Ill. 126; *State v. Warmoth*, 22 La. Ann. 1; *In re Dennett*, 32 Me. 508; *Rice v. Austin*, 19 Minn. 103 (Gil. 74); *State v. Fletcher*, 39 Mo. 388; *Mauran v. Smith*, 8 R. I. 192; *Turnpike Co. v. Brown*, 8 Baxt. (Tenn.) 490;

Railway Co. v. Randolph, 24 Tex. 317; City of Chicago v. Evans, 24 Ill. 52; Smith v. McCarthy, 56 Pa. St. 359; Des Moines Gas Co. v. City of Des Moines, 44 Iowa, 505. The principle which underlies the decisions is well stated by our own court in Wright v. Defrees, 8 Ind. 298, where it was said: 'The powers of the three departments are not merely equal; they are exclusive in respect to the duties assigned to each. They are absolutely independent of each other.' . . . It is a rudimentary principle, acted upon again and again, that when it is ascertained that there is no jurisdiction, courts will go no further. It would not only be a vain and fruitless thing to assume to decide a question when there is no jurisdiction, but it would be a mischievous thing, because it would give an appearance of authority to that which is utterly destitute of force. Such a decision would be the merest shadow of authority, binding nobody: People v. Walter, 68 N. Y. 403. See *Id.* 411; Weeden v. Town Council, 9 R. I. 128:" Smith v. Myers, 109 Ind. 1, 9 N. E. Rep. 692, 695, 697, 698.

Having decided it is without jurisdiction, this court advisedly and properly refrains from expressing any opinion upon the effect of the joint resolution as a proposed constitutional amendment. It leaves that matter where it found it. It is silent upon the subject because the law does not authorize it to speak. An injunction cannot be granted. The action must be dismissed, and defendants have judgment for costs. It is so ordered, all the judges concurring.

INJUNCTION AGAINST ACTS OF PUBLIC OFFICERS.

1. **Executive Acts not Enjoined as a General Rule.**—Equity has no jurisdiction to review the acts of public officers in the performance of executive, discretionary, or quasi-judicial duties, under color of authority. *Certiorari* is the proper remedy: Gaines v. Thompson, 7 Wall. 347; Western Star Lodge v.

Schminke, 4 McCrary, (U. S.) 366; Lane v. Anderson, 67 Fed. Rep. 563; People v. Board of Supervisors, 75 Cal. 179; Scofield v. Perkerson, 46 Ga. 325, 350; Herrick v. Carpenter, 54 Iowa, 340; Luce v. Fensler, 85 Iowa, 596; Western R. R. Co. v. De Graff, 27 Minn. 1; Secombe v. Kittelson, 29 Minn. 555; Mooers v. Smedley, 6 Johns. Ch. (N. Y.) 28; Van Doren v. Mayor, 9 Paige Ch. (N. Y.) 388; Mayor v. Meserole, 26 Wend. (N. Y.) 132, reversing 8 Paige Ch. 198; Livingston v. Hollenbeck, 4 Barb. (N. Y.) 10; Bouton v. Brooklyn, 15 Barb. (N. Y.) 375; Gillespie v. Broas, 23 Barb. (N. Y.) 370; Hyatt v. Bates, 40 N. Y. 164; Brew v. Houck, 101 N. C. 627; Warfel v. Cochran, 34 Pa. 381; Delaware County's Appeal, 119 Pa. 159; Bates v. Taylor, 87 Tenn. 319. As a general rule, it is not within the powers of a court of equity to supervise the conduct of public officers in the performance of their official duties, or to prohibit such officers from acting or to compel them to act in matters which concern political and personal rights, as distinguished from rights of property: Steele v. Municipal Signal Co., 160 Mass. 36. Thus, the head of an executive department of the government cannot be restrained from enforcing a general law affecting only public interests: Grant v. Cooke, 7 D. C. 165. An order of the postmaster-general forbidding the delivery of mail to a certain address, on the ground that the mail was being used for an illegal purpose, cannot be set aside by a court of equity: Enterprise Sav. Assn. v. Zumstein, 67 Fed. Rep. 1000. So, an executive officer cannot be restrained from acting, merely on the ground that the statute under authority of which he acts is unconstitutional: Georgia v. Stanton, 6 Wall. 50; Green v. Mills, 69 Fed. Rep. 852; Gibbs v. Green, 54 Miss. 592; State v. Pennoyer, 26 Oreg. 205; State v. Lord, 28 Oreg. 498; Thomas v. Rowe, (Va.) 22 S. E. Rep. 157; especially if the alleged injury is threatened only: Board of Comrs. of Barber Co. v. Smith, 48 Kans. 331; *e. g.*, an injunction will not lie to restrain the President of the United States from executing an unconstitutional act of congress: Mississippi v. Johnson, 4 Wall. 475; Avery v. Fox, 1 Abb. (U. S.) 246; or to restrain the secretary of state from issuing a charter, on the ground that the statute authorizing him so to do is unconstitutional: Larcom v. Olin, 160 Mass. 102.

2. Acts causing Irreparable Injury will be Enjoined.—Whenever subordinate public officers, under color and claim of right, are proceeding to impair either public or private rights, or when their proceedings will result in serious injury to private citizens, without corresponding public benefit, or are in violation of law, and will cause irreparable injury, or a multiplicity of suits, they will be enjoined from so doing, though their acts are executive and discretionary : *Green v. Oakes*, 17 Ill. 249 ; *Green v. Green*, 34 Ill. 320 ; *Mohawk & H. R. R. Co. v. Artcher*, 6 Paige Ch. (N. Y.) 83 ; *Oakley v. Trustees*, 6 Paige Ch. (N. Y.) 262 ; *Blanton v. Southern Fertilizing Co.*, 77 Va. 335 ; especially if the statute from which their authority is derived is unconstitutional : *Glover v. Board of Flour Inspectors*, 48 Fed. Rep. 348 ; *Cotting v. Kansas City Stock Yards Co.*, 79 Fed. Rep. 679 ; *State v. Judge of Seventh Judicial District Court*, 42 La. An. 1104 ; and *a fortiori*, when they act without authority : *Coast Co. v. Mayor*, (N. J.) 36 Atl. Rep. 21 ; *People v. Canal Board*, 55 N. Y. 390 ; or in violation of duty : *Board of Liquidation v. McComb*, 92 U. S. 531 ; *Alexander v. Johnson*, 144 Ind. 82. Thus, a taxpayer may have an injunction to restrain an unlawful disposition of the public funds, or other injury to him as such : *Barry v. Goad*, 89 Cal. 215 ; *Littler v. Jayne*, 124 Ill. 123 ; *Rice v. Smith*, 9 Iowa, 570 ; *Brockman v. Creston*, 79 Iowa, 587 ; *Black v. Ross*, 37 Mo. App. 250 ; *Normand v. Otoe Co.*, 8 Neb. 18 ; *e. g.*, the erection of a new county, under an unconstitutional statute : *Bradley v. Comrs.*, 2 Humph. (Tenn.) 428 ; though after the county has been erected, its officers will not be enjoined from acting as such : *Ford v. Farmer*, 9 Humph. (Tenn.) 152 ; and a private citizen may restrain an unlawful interference with his property rights : *Hotz v. Hoyt*, 34 Ill. App. 488 ; *Asheville St. Ry. Co. v. City of Asheville*, 109 N. C. 688 ; especially if a continuing trespass : *Belknap v. Belknap*, 2 Johns. Ch. (N. Y.) 463 ; *e. g.*, the officers and agents of the interior department will be enjoined from unlawfully ejecting a person who has a vested right to the possession of lands : *Caldwell v. Robinson*, 59 Fed. Rep. 653. So, public officers may be restrained from acting in excess of their real authority, though under color of authority : *Foster v. Hornsby*, 2 Ir. Ch. 426 ; *Stubber v. Hornsby*, 2 Ir. Ch. 449 ; *e. g.*, in taking land for works of internal improvement : *McArthur*

v. Kelly, 5 Ohio, 139; *Moorhead v. Little Miami R. R. Co.*, 17 Ohio, 340; *Anderson v. Comrs.*, 12 Ohio St. 635; but if the injury is to private rights only, it will not be enjoined, unless irreparable: *N. O. City & L. R. R. Co. v. State Board of Arbitration*, 47 La. An. 874; nor if it is merely anticipated: *Mason v. Rollins*, 2 Biss. (U. S.) 99. The federal courts may enjoin a state officer from acting under an unconstitutional statute of the state: *President of Yale College v. Sanger*, 62 Fed. Rep. 177; and the state courts may enjoin the acts of federal officers: *Brewer v. Kidd*, 23 Mich. 440.

Ministerial acts will be enjoined, whenever they are likely to result in public or private injury: *Martin v. Ingham*, 38 Kans. 641; *Martin v. Lacy*, 39 Kans. 703; *Lane v. Schomp*, 20 N. J. Eq. 82; *Chesapeake & Ohio R. Co. v. Miller*, 19 W. Va. 408.

Injunction — To Restrain Passage of Ordinance — Parties.

NEW ORLEANS WATER WORKS CO. *v.* CITY OF NEW ORLEANS.

(Supreme Court of the United States. November 30, 1896.)

(164 U. S. 471; 17 Sup. Ct. Rep. 161.)

In a suit by a waterworks company against a city, a decree will not be granted, declaring void, and requiring the city to cancel, as in derogation of the rights of the company under its contract with the city, ordinances permitting certain property owners to lay pipes in the streets to convey water to their premises; such owners not being brought before the court, or given an opportunity to be heard.

Nor is it ground for granting such a decree that the bringing of separate actions against such property owners to prevent the enforcement of the several ordinances would involve the company in a multiplicity of suits.

The passage of an ordinance by a city council is a legislative act, which a court of equity will not enjoin.

Appeal from the Circuit Court of the United States for the Eastern District of Louisiana.

J. R. Beckwith, for appellant.

S. L. Gilmore and *H. J. Leovy*, for appellee.

Mr. Justice HARLAN delivered the opinion of the court.— This suit was determined in the court below upon demurrer to the bill. The question presented is whether the bill set forth a cause of action entitling the appellant, who was the plaintiff below, to the relief asked.

The case made by the bill is substantially as follows: By the fifth section of the act of the general assembly of Louisiana, commonly known as "Act No. 33, Extra Session of 1877," it was provided that the New Orleans Water Works Company, in its corporate capacity, should own and possess the privileges acquired by the city of New Orleans from the Commercial Bank; that it should have for fifty years from the passage of the act, the exclusive privilege of supplying the city of New Orleans and its inhabitants with water from the Mississippi river, or any other stream or river, by means of pipes and conduits, and for erecting or constructing any necessary works or engines or machines for that purpose; that it might contract for, purchase or lease any land or lots of ground, or the right to pass over and enter the same from time to time, as occasion required, through which it might be necessary to convey the water into said city, or to distribute the same to the inhabitants of said city, and construct, dig or cause to be opened any canals or trenches whatsoever for the conducting of the water of the rivers from any place or places it deemed fit, and raise and construct such dykes, mounds and reservoirs as might be required for securing and carrying a full supply of pure water to the city and its inhabitants; enter upon and survey such lands as it might think proper, in order to ascertain the best mode of furnishing a supply of water;

and lay and place any number of conduits or pipes or aqueducts, and cleanse and repair the same, through or over any of the lands or streets of the city, provided the same should not be an obstruction to commerce or free circulation.

The eighteenth section of the same act provided: "That nothing in this act shall be so construed as to prevent the city council from granting to any person or persons, contiguous to the river, the privilege of laying pipes to the river exclusively for his own or their own use."

While the New Orleans Water Works Company was proceeding under the above legislative enactment constituting its charter, the Louisiana constitution of 1879 was adopted. By article 258 of that constitution it was provided: "All rights, actions, prosecutions, claims and contracts, as well of individuals as of bodies corporate, and all laws in force at the time of the adoption of this constitution, and not inconsistent therewith, shall continue as if the said constitution had not been adopted. But the monopoly features in the charter of any corporation now existing in the state, save such as may be contained in the charters of railroad companies, are hereby repealed."

After this constitutional provision took effect, the city council of New Orleans passed, November 15, 1882, an ordinance allowing Robert E. Rivers, the lessee of the St. Charles Hotel in New Orleans, "the right of way and privilege to lay a water pipe from the Mississippi river, at any point opposite the head of Common or Gravier streets, through either of these streets, to said hotel, its front and side streets, with all needed attachments and appurtenances, and to distribute said water through said hotel as said Rivers, or lessee, may desire from said pipes," etc.

Rivers being about to take the benefit of this ordinance, the Water Works Company commenced suit against him in the circuit court of the United States for the Eastern District of Louisiana, in which it sought a decree perpetually restraining him from laying pipes, conduits or mains in the

public streets of New Orleans for the purpose of conveying water from the Mississippi river to his hotel. The company proceeded in that suit upon the ground that it had a valid contract with the state and city for an exclusive right for the full term of fifty years from March 31, 1877, of supplying the city of New Orleans and its inhabitants, other than those contiguous to the Mississippi river, with water from that stream by means of pipes and conduits placed in the streets of that city, and that the obligation of that contract was protected by the constitution of the United States against impairment by any act of the state. Rivers claimed the right to proceed with the construction of pipes, mains and conduits under the authority of the ordinance above referred to, which rested for its validity, as he claimed, upon the constitution and laws of Louisiana.

The bill filed by the Water Works Company against Rivers was dismissed in the circuit court, and upon appeal to this court the judgment of dismissal was reversed, with the direction to enter a decree perpetually restraining Rivers, as prayed for in the bill filed by the Water Works Company. The opinion in *New Orleans Water Works Co. v. Rivers*, 115 U. S. 674, 6 Sup. Ct. Rep. 273, states fully the grounds upon which this court proceeded.

In 1882 the St. Tammany Water Works Company was organized under the general laws of Louisiana for the purpose of furnishing and supplying the inhabitants of the city of New Orleans and other localities contiguous to the line of its works with an ample supply of clear and wholesome water from such rivers, streams and other fountain sources as might be found most available for such purpose, by means of pipes and conduits. The company being about to take steps to obtain authority for bringing into New Orleans the waters of the Bogue Falaya river, in the parish of St. Tammany, and distributing the same by means of pipes, mains and conduits placed in the streets of the city parallel with those constructed by the New Orleans

Water Works Company, the latter corporation instituted, in the circuit court of the United States for the Eastern district of Louisiana, a suit for an injunction to restrain the other company from carrying out its scheme. On appeal from the decree of the circuit court granting the injunction, this court reaffirmed the principles announced in the Rivers Case, saying: "As the exclusive right of the appellee to supply the city of New Orleans and its inhabitants with water was not restricted to water drawn from the Mississippi river, but embraced water from any other stream, it is impossible to distinguish this case in principle from that of New Orleans Water Works Co. v. Rivers. Upon the authority of the latter case it must be held that the carrying out by the appellant of its scheme for a system of waterworks in New Orleans would be in violation of the rights of the appellee, and that the state constitution of 1879, so far as it assumes to withdraw the exclusive privileges granted to the appellee, is inconsistent with the clause of the national constitution forbidding a state from passing any law impairing the obligation of contracts:" *St. Tammany Water Works v. New Orleans Water Works*, 120 U. S. 64, 67, 7 Sup. Ct. Rep. 405, 407.

The present suit was brought February 8, 1894, by the New Orleans Water Works Company against the city of New Orleans. The bill set out the foregoing facts, and gave the history of the two cases to which reference has been made.

It further alleged that after the above adjudications the defendant continued to make and promulgate ordinances conferring upon individuals and corporations the right to lay pipes and mains through the streets and public ways of New Orleans to premises not contiguous to the rivers and waters with which said pipes and mains connected, from which the water supply is drawn and consumed within the city of New Orleans, such premises not being included in the proviso in the plaintiff's charter relating to the owners

of property contiguous to said waters ; that the defendant has continued to pass and promulgate such ordinances, and threatens to continue to do so in the future ; that the ordinances set forth by copy, and contained in Exhibit C², filed with and made a part of the bill, had been adopted and promulgated by the defendant in open defiance and disregard of the plaintiff's rights ; that the plaintiff is advised and believes that the said ordinances set forth in said Exhibit C constitute but a portion of those of like character adopted and promulgated by the defendant ; that in nearly all instances where said ordinances have been adopted and promulgated the parties named as the beneficiaries or grantees therein have availed themselves of the said act of the city to lay pipes and mains through the streets and public ways of the city, and established pumping machinery to draw water through said mains for a water supply ; that in the instances where they have not already availed themselves of this supposed warrant to establish waterworks of their own they are intending to so establish pipes and mains, and will do so unless restrained therefrom by the courts ; and that none of the premises referred to in said ordinances are contiguous to the Mississippi river, or within the proviso contained in the plaintiff's charter and contract with the state relating to or affecting the owners of property contiguous to the river.

The bill also alleged that most of the persons and corporations named as grantees in said ordinances are large consumers of water, and, but for said wrongful act of the city, would be customers of and consumers of the water provided as public water supply by the plaintiff ; that the plaintiff has pipes and mains so located that it could supply all of said premises with water, and should receive recompense and profit thereby ; that its franchises, and the income that should accrue to it from public water supply, have been lessened, and its revenues diminished, by a sum exceeding \$30,000 in the past, and that such loss of income and

revenue is continuing, and, if continued during the lifetime or corporate existence of the plaintiff, would amount to many thousand dollars more; that many of the said ordinances of the city of New Orleans complained of contain on the face thereof a condition that said license or grant of the right to lay pipes and mains and pump water from the river shall continue only during the will of the defendant; that in the cases where that provision is not contained in the text of the ordinances the city has full and complete power to revoke and recall such fraudulent and wrongful grants and permissions at its will, and thereby cease to countenance said wrongdoers, or furnish them with any colorable right to continue and maintain said pipes and mains so wrongfully established, and in good conscience should recall, revoke and expunge all of said pretended ordinances and regulations of its own motion, without compulsion; that by reason of the said wrongful acts of the defendant, and the large number of grants and privileges made by the city, it is practically impossible for the plaintiff to obtain full and adequate relief through proceedings instituted against the said several persons and corporations receiving said supposed grants and authority to establish pipes and pumping machinery for the purpose of drawing water from the Mississippi river by reason of the great delays and the enormous expense of litigating with so many several defendants, and the multiplicity of suits and actions necessary to restrain said wrongful acts by proceeding against the several supposed grantees.

It was further alleged that the defendant and other persons proposing to assail the plaintiff's rights contend that there is ambiguity and uncertainty in the eighteenth section of plaintiff's charter; that at the time of the acceptance of its charter and grant the plaintiff was advised, and, it believes, correctly, that said § 18 could only lawfully be construed as conferring upon the city the right to grant the privilege of laying pipes to such person or persons or cor-

porations as may, at the time of such grant, be the owner of, or in the lawful possession of, real estate or property extending down to the river front, and touching the said river, and having riparian rights on the banks of said river, subject only to such public servitude or right of way as may be impressed upon said property by the operation of the general statutes of Louisiana bearing upon servitudes attaching to public waters, relating to the right of the public to moor and unload vessels at such banks, and a right of way for travel or public roads on or along the banks of such waters, and the servitude or right the public may have to occupy the banks of rivers, and to establish levees or embankments to prevent overflow, where such public waters are subject or liable to overflow from any cause; that the defendant and others allege and insist that such construction does not express the intent of the legislature of the state in granting said franchises, and insist upon a construction and range for § 18, which, if correct, would destroy the plaintiff's rights and privileges conferred under and by its charter in so far as the same relate to the territory and limit within which the plaintiff has the exclusive right to furnish public water supply through pipes and mains; that this alleged ambiguity has given rise to serious contention, has already caused, and, if continued, will in the future cause the plaintiff much contention, litigation, expense, loss and damage; that it is important that the true, actual and proper construction of said § 18, and the proviso therein contained, should be judicially ascertained and decreed; that the court should adjudge, decree and declare, as between the plaintiff and the defendant, the true and actual meaning and construction of said section and proviso, in order that all future disputes and contentions in relation thereto may be at an end, and the plaintiff have knowledge of its actual rights in the premises; that the plaintiff is remediless in a court of law, and therefore applies and appeals to the court sitting in equity, having peculiar and

full power and jurisdiction in the premises by virtue of the constitution and laws of the United States; and that all of said actings and doings of the defendant are contrary to equity and good conscience, and tend to the manifest wrong, injury and oppression of the plaintiff.

The relief sought by the bill is a decree determining to what class the property, ownership or possession of the property specified contained in that § 18 applies, and establishing and defining the limit beyond which the defendant has no power under said state legislation to authorize any person or corporation to invade the plaintiff's exclusive rights by laying pipes and drawing water from the Mississippi river or other public waters; that it be also adjudged and decreed that the rights conferred upon the plaintiff are those declared in *New Orleans Water Works Co. v. Rivers*, and in the case of *St. Tammany Water Works v. New Orleans Water Works*; that the plaintiff is lawfully entitled to have for and during the period named in said act of incorporation all of the exclusive rights and privileges named and set forth therein; that all the said acts, resolutions and grants sought to be made by the defendant to persons or corporations, not being possessors or owners of property not touching the banks of the Mississippi river within the parish of Orleans, are null, void and of no effect; that defendant be ordered, adjudged and decreed within a time certain, to be named in the decree, to recall, expunge, repeal and cancel each and all of said alleged ordinances, resolutions, grants or licenses so made by it since the date the plaintiff became invested with said exclusive rights, save only such grants, permits, ordinances or resolutions as relate to or are confined to property and premises contiguous to the Mississippi river; and that, in the event defendant shall neglect or refuse in some public way to declare the same recalled, cancelled, annulled and avoided within a time specified in such decree, the court will declare, adjudge and decree the same, and each and all of them, to be absolutely

null and void, and of no effect, and as conferring no rights or authority whatsoever, nor lawful reason for the invasion of the plaintiff's said exclusive rights.

The plaintiff asked that a writ of injunction be issued, inhibiting and forbidding the city of New Orleans, its council, officers, agents or departments from granting or allowing to any person, persons or corporation any further or other like grants, licenses, privileges or warrants in any form on the face thereof assuming to grant unto any person, persons or corporation any right or privilege to lay or maintain any pipes, mains or conduits from the Mississippi river across, along or through any public place or territory within the limits of New Orleans where said premises are not contiguous to the Mississippi river; also, that it be adjudged and decreed that, in so far as the matters were in issue and litigated in said cause of the said New Orleans Water Works Company against the St. Tammany Water Works Company, the judgment and decree therein determined the rights of the plaintiff as between it and the city of New Orleans beyond further contention and dispute, and that the defendant "be compelled to abide by, observe and enforce the same;" and that such decree be carried into full force and effect by such proper order, judgment or decree therein as might be necessary to accomplish that end, and compel obedience to its provisions.

The circuit court sustained a demurrer to the bill, and dismissed the suit, with costs to the city.

It appears from the bill of complaint—the facts therein set forth being admitted by demurrer—that the city of New Orleans has by ordinances granted to a large number of corporations, associations and individuals the privilege of laying pipes in its streets for the purpose of conveying water to their respective premises from the Mississippi. These ordinances, the plaintiff contends, are in derogation of its rights and privileges as heretofore declared and adjudged by this court in the Rivers and St. Tammany cases.

None of the parties for whose benefit the ordinances above referred to were passed were brought before the court or given an opportunity to be heard. Nevertheless the plaintiff seeks a decree not only declaring those ordinances to be null and void, but requiring the city, within a named time, to recall, expunge, repeal and cancel each ordinance that does not relate to premises contiguous to the Mississippi river, and if the city does not within such time, and in some public way, cancel and annul those ordinances, then that the court in this suit shall adjudge and decree them to be null and void, as illegally interfering with the rights of the plaintiff.

We do not suppose that any precedent can be found that would justify a court of equity in giving such relief. A decree declaring the ordinances in question void would have no effect in law upon the rights of the beneficiaries named in the ordinances; for, in the absence of the parties interested, and without their having an opportunity to be heard, the court would be without jurisdiction to make an adjudication affecting them. Such a decree would appear, upon the very face of the record, not to be due process of law, and could be treated everywhere as a nullity: *Windsor v. McVeigh*, 93 U. S. 274, 277; *Pennoyer v. Neff*, 95 U. S. 714, 733; *Scott v. McNeal*, 154 U. S. 34, 46, 14 Sup. Ct. Rep. 1108.

. Ought the court to have proceeded to a decree, or held the bill to be sufficient for relief, as between the plaintiff and the city? In effect, a decree is asked against the city reasserting, for its guidance in the future, the principles announced in the *Rivers* and *St. Tammany* cases, and informing it that, in passing the ordinances complained of, it had done violence to those principles. But of what avail would such a decree be, if the city council, the members of which are not before the court, were left free to enact ordinances granting to other parties, in violation of the plaintiff's rights, the privilege of placing pipes in the streets of the city through which to convey water from the Mississippi

river to their respective premises? If it be said that a final decree against the city, enjoining it from making such grants in the future, will control the future action of the city council of New Orleans, and will, therefore, tend to protect the plaintiff in its rights, our answer is that a court of equity cannot properly interfere with, or in advance restrain, the discretion of a municipal body while it is in the exercise of powers that are legislative in their character. It ought not to attempt to do indirectly what it could not do directly. In view of the adjudged cases, it cannot be doubted that the legislature may delegate to municipal assemblies the power of enacting ordinances that relate to local matters, and that such ordinances, if legally enacted, have the force of laws passed by the legislature of the state, and are to be respected by all. But the courts will pass the line that separates judicial from legislative authority if by any order, or in any mode, they assume to control the discretion with which municipal assemblies are invested when deliberating upon the adoption or rejection of ordinances proposed for their adoption. The passage of ordinances by such bodies are legislative acts, which a court of equity will not enjoin: *City of Chicago v. Evans*, 24 Ill. 52, 57; *Des Moines Gas Co. v. City of Des Moines*, 44 Iowa, 505; 1 Dill. Mun. Corp. § 308, and notes; 2 High, Inj. § 1246. If an ordinance be passed, and is invalid, the jurisdiction of the courts may then be invoked for the protection of private rights that may be violated by its enforcement: *Page v. Mayor*, 34 Md. 558, 564; *Mayor, etc., v. Radecke*, 49 Md. 217, 231.

As no decree can be properly rendered that will affect the rights of the beneficiaries named in the ordinances enacted before the suit was commenced—such beneficiaries not being before the court—a court of equity ought not, by any form of proceeding, to interfere with the course of proceedings in the city council of New Orleans, and enjoin that branch of its municipal government from hereafter passing ordinances similar to those heretofore enacted, and which

are alleged to be obnoxious to the plaintiff's rights. The mischievous consequences that may result from the attempt of courts of equity to control the proceedings of municipal bodies when engaged in the consideration of matters entirely legislative in their character, are too apparent to permit such judicial action as this suit contemplates. We repeat that when the city council shall pass an ordinance that infringes the rights of the plaintiff, and is unconstitutional and void as impairing the obligation of its contract with the state, it will be time enough for equity to interfere, and by injunction prevent the execution of such ordinance. If the ordinances already passed are in derogation of the plaintiff's contract rights, their enforcement can be prevented by appropriate proceedings instituted directly against the parties who seek to have the benefit of them. This may involve the plaintiff in a multiplicity of actions. But that circumstance cannot justify any such decree as it asks.

Upon the grounds we have indicated, and without considering the merits of the case, the decree below must be affirmed.

JURISDICTION OF EQUITY OVER THE ORDINANCES OF MUNICIPAL CORPORATIONS.

1. Injunction to Restrain the Passage of an Ordinance.— Since the acts of the councils of a municipal corporation, like those of any other legislative body, rest wholly in their discretion, as long as they keep within the limits of their delegated powers, and are not reviewable by the courts, a court of equity will not interfere by injunction to restrain a municipal corporation from passing a resolution or ordinance, even though illegal, unless it appears that the mere voting on, and the formal passage of, such resolution or ordinance, would instantly, without any action or attempt to enforce any right or privilege under it, effect an irreparable private injury; or unless it would occasion a vexatious private injury, by giving rise to a multiplicity of actions: *Lewis v. Denver City Water Works Co.*, 19

Colo. 236; *Stevens v. St. Mary's Training School*, 144 Ill. 336; *Harrison v. New Orleans*, 33 La. An. 222; *Whitney v. Mayor*, 28 Barb. (N. Y.) 233; *People v. Mayor*, 32 Barb. (N. Y.) 35. Accordingly, the passage of an ordinance will not be enjoined, though it is in violation of a contract between the plaintiff and the municipality, granting an exclusive franchise: *Montgomery Gas Light Co. v. City Council of Montgomery*, 87 Ala. 245; *Des Moines Gas Co. v. Des Moines*, 44 Iowa, 505; *Cape May & Schellenger's Landing R. R. Co. v. Cape May*, 35 N. J. Eq. 419; though it creates an illegal debt: *Murphy v. East Portland*, 42 Fed. Rep. 308; or though it authorizes an illegal contract: *Alpers v. San Francisco*, 32 Fed. Rep. 503; *Stevens v. St. Mary's Training School*, 144 Ill. 336. So, a court of equity has no jurisdiction of a bill to restrain the removal of a public officer: *In re Sawyer*, 124 U. S. 200; *Delahanty v. Warner*, 75 Ill. 185; *Tappan v. Gray*, 7 Hill, (N. Y.) 259, affirming 9 Paige Ch. 507, which reversed 3 Edw. Ch. 450; *Armatage v. Fisher*, 74 Hun, (N. Y.) 167; and consequently it cannot enjoin the passage of an ordinance unlawfully abolishing an office: *Sheridan v. Colvin*, 78 Ill. 237. *A fortiori*, if an ordinance confers no rights or authority, it is harmless, until steps are taken to make it available; and the court will not enjoin its passage: *Chicago v. Evans*, 24 Ill. 52; *Des Moines Gas Co. v. Des Moines*, 44 Iowa, 505; and the fact that the vacation of a street under a pending ordinance will cause damage to a property holder does not authorize the granting of an injunction to restrain the passage of the ordinance; for ample provision for the satisfaction of damage may be made in that ordinance or in a subsequent one: *Atkinson v. Wykoff*, 58 Mo. App. 86. If, however, an ordinance will work irreparable injury, its passage will be enjoined: *Spring Valley Waterworks v. Bartlett*, 16 Fed. Rep. 615. In *Roberts v. Louisville*, 92 Ky. 95, it was held that when a city holds, for the purpose of erecting wharves thereon, real property, which was acquired under a legislative act, and paid for by taxation, citizen taxpayers whose interests are subserved by the maintenance of wharves, may sue to restrain by injunction the passage of an ordinance by the city council, authorizing the mayor to convey the property to the commissioners of the sinking fund. So, when the passage of an ordinance or resolution has been

enjoined by a court having jurisdiction of the subject-matter, a member of the city council, who voted for its passage, will be guilty of contempt. The remedy in such case is by appeal, not by disobeying the mandate of the court: *People v. Hardenburgh*, 90 N. Y. 411.

2. Injunction to Prevent Enforcement of Ordinance.—

As soon as an ordinance or resolution is passed, however, the injury which before was only threatened becomes actual, and if the ordinance is void, any one whose interests are to be injuriously affected by its enforcement may have an injunction to prevent that enforcement by restraining the municipal officers from acting under color of its authority, either on the ground of irreparable injury or to avoid a multiplicity of suits; and the complainant need not first test the validity of the ordinance at law: *Jacksonville v. Ledwith*, 26 Fla. 163; *Ledwith v. Jacksonville*, 32 Fla. 1; *Peoria v. Johnston*, 56 Ill. 45; *Davis v. Fasig*, 128 Ind. 271; *City of Rushville v. Rushville Nat. Gas Co.*, 132 Ind. 575; *Genois v. Lockett*, 13 La. 545; *Holland v. Mayor*, 11 Md. 187; *Bouldin v. Mayor*, 15 Md. 18; *Mayor v. Porter*, 18 Md. 284; *Mayor v. Groshon*, 30 Md. 486; *Mayor v. Gill*, 31 Md. 375; *Page v. Mayor*, 34 Md. 558; *Hazlehurst v. Mayor*, 37 Md. 199; *St. Mary's Industrial School v. Brown*, 45 Md. 310; *Mayor v. Radecke*, 49 Md. 217; *Mayor v. Scharf*, 54 Md. 499; *Deems v. Mayor*, 80 Md. 164; *Sylvester Coal Co. v. St. Louis*, 130 Mo. 323; *Varick v. Mayor*, 4 Johns. Ch. (N. Y.) 53; *Mohawk & Hudson R. R. Co. v. Artcher*, 6 Paige Ch. (N. Y.) 83; *Oakley v. Williamsburgh*, 6 Paige Ch. (N. Y.) 262; *Austin v. Austin Cem. Assn.*, 87 Tex. 330; *Boughner v. Clarksburg*, 15 W. Va. 394; *Mason City S. & M. Co. v. Mason*, 23 W. Va. 211. A court of equity has jurisdiction to interfere, by injunction, when public officers, under claim of right, are proceeding illegally to impair the rights or injure the property of individuals or corporations, or when it is necessary to prevent a multiplicity of suits: *Smith v. Bangs*, 15 Ill. 399. The fact that an ordinance is void must be clearly made to appear, however; and as a general rule, a mere charge of unconstitutionality will not be sufficient to sustain the action; especially when the ordinance is a police regulation: *Hottinger v. New Orleans*, 42 La. An.

629; for a properly enacted ordinance, within the scope of the discretionary powers of the municipality, will not be interfered with by the courts, even if it amounts to an abuse of discretion: *Coulson v. Portland*, Deady, (U. S.) 481; *Coast Line R. R. Co. v. Cohen*, 50 Ga. 451; *Bacon v. Walker*, 77 Ga. 336; *Gartside v. East St. Louis*, 43 Ill. 47; *Carlton v. Salem*, 103 Mass. 141; *Detroit v. Hosmer*, (Mich.) 44 N. W. Rep. 622; *Bond v. Mayor*, 19 N. J. Eq. 376; *Bell v. Rochester*, 30 N. Y. Suppl. 365; *Rosenbaum v. Newbern*, 118 N. C. 83; and the mere allegation that a properly enacted ordinance is illegal will not authorize an injunction to restrain its enforcement; the plaintiff must also show that he will suffer irreparable injury, or that it will occasion a multiplicity of suits: *Poyer v. Des Plaines*, 123 Ill. 111. So, if the ordinance merely threatens an injury to one person or corporation, that person must wait until his rights are actually interfered with, before bringing suit; see *State v. Mayor*, 58 N. J. L. 510; and even if the ordinance is void, it will not be enjoined at the suit of those who are not affected by it. In *Davis v. Mayor*, 14 N. Y. 506, reversing 1 Duer, 451, the court held that an injunction against the laying of a street railway track under authority of an ordinance was improperly granted at the suit of parties who owned no real estate on that street.

3. What Ordinances will be Enjoined.—(1) An injunction will be granted to restrain the enforcement of an ordinance not legally passed: *Mayor v. Gill*, 31 Md. 375. When the legislature has conferred upon the city council the power to improve the streets of the city, but has made the exercise of this power to depend upon petition and notice to parties interested, and has granted to property holders, liable to be taxed for the improvement, the right to present their objections and to be heard thereon, the execution of an ordinance for the purpose of improving streets, passed without such hearing, though demanded, will be enjoined until the hearing is had: *Dennison v. City of Kansas*, 95 Mo. 416. (2) The enforcement of an ordinance which tends to impair or destroy property rights will be enjoined; *e. g.*, one in violation of an existing legal contract: *Alpers v. San Francisco*, 32 Fed. Rep. 503; one creating a

nuisance: *McDonald v. Newark*, 42 N. J. Eq. 136; and one ordering a dealer in lumber to remove his lumber from his lot: *Pieri v. Mayor*, 42 Miss. 493. Accordingly, if an ordinance directs the opening of a street through a park, its enforcement will be restrained at the suit of persons who bought adjacent land on the strength of the existence of the park: *Price v. Thompson*, 48 Mo. 361; a city may be enjoined from leasing for market purposes stands erected in front of the complainants' property, under authority of an ordinance: *Schopp v. St. Louis*, 117 Mo. 131; and when the authorities of a city undertake, by ordinance, from fraudulent and malicious motives, to appropriate so much of one side of a street for the purposes of a roadway as will deprive the adjacent property owners of any sidewalk, an injunction will be granted, at the suit of the property owners, to restrain the city from enforcing the ordinance: *Carter v. Chicago*, 57 Ill. 283. So, an ordinance requiring a license for a business, lawful in itself, which amounts to a confiscation of the property invested in such business, or to a prohibition of the business, is void, and its enforcement will be enjoined. In the *Ferris Wheel Case*, the city of Chicago first attempted to prevent the erection of the wheel upon the premises of the company; and the latter procured an injunction restraining it from interfering therewith. This decree was affirmed by the appellate court on the ground that there was no ordinance of the city which would apply to such an erection: *Chicago v. Ferris Wheel Co.*, 58 Ill. App. 625. Immediately after that decision the city passed an ordinance, the effect of which was to require the company to pay fifty dollars a day as a license fee, and prohibiting the erection or maintenance of the wheel upon any lot or enclosure, any part of which should be within fifteen hundred feet of any of the public parks of the city. The Wheel Company then applied for an injunction against the enforcement of the ordinance, which was granted, on the ground that it amounted to a confiscation of the property already invested in the wheel, as well as to a prohibition of the erection and maintenance of a lawful construction: *Chicago v. Ferris Wheel Co.*, 60 Ill. App. 384. (3) An injunction will be granted to prevent interference with the grant of a franchise, whether by statute or ordinance; and consequently the enforcement of an ordinance which tends to de-

stroy or impair the value of a franchise, whether by repealing the ordinance which granted it, by granting a conflicting franchise to another corporation, or in any other way, will be enjoined: *Port of Mobile v. Louisville & Nashville R. R. Co.*, 84 Ala. 115; *Atlanta v. Gate City Gas Light Co.*, 71 Ga. 106; *Quincy v. Bull*, 106 Ill. 337; *Burlington v. Burlington St. Ry. Co.*, 49 Iowa, 144; *Springfield Ry. Co. v. Springfield*, 85 Mo. 674; *Paterson & Passaic Horse R. R. Co. v. Mayor*, 24 N. J. Eq. 158; *Cape May & Schellenger's Landing R. R. Co. v. Cape May*, 35 N. J. Eq. 419; *Asheville St. Ry. Co. v. City of Asheville*, 109 N. C. 688. In *St. Louis R. R. Co. v. Northwestern St. Louis Ry. Co.*, 69 Mo. 65, an act of the legislature declared that "no street railroad shall hereafter be constructed in the city of St. Louis nearer to a parallel road than the third parallel street from any road now constructed;" and some years afterwards, the defendant company was empowered by ordinance to construct its road along an adjoining parallel street. The circuit court and court of appeals refused to grant an injunction against its doing so, but this decision was reversed by the supreme court. (4) The enforcement of any ordinance may be enjoined when there has been no violation of it in the particular case: *Northern Pac. R. R. Co. v. Spokane*, 52 Fed. Rep. 428; *City Council of Montgomery v. Louisville & Nashville R. R. Co.*, 84 Ala. 127; *McKibbin v. Ft. Smith*, 35 Ark. 352.

4. Ordinances affecting Taxpayers.—A taxpayer has an interest in any action of the municipality that tends to increase the burden of taxation; and if the proposed action be illegal he can sue for an injunction to restrain it: *Hanson v. Hunter*, 86 Iowa, 722. Accordingly, any expenditure or appropriation, or other disposition of the funds of a municipality, in a manner or for a purpose not authorized by law, though in pursuance of an ordinance, will be restrained by an injunction at the suit of a taxpayer: *Paterson v. Bowes*, 4 Grant, (Can.) 170; *West Gwillimbury v. Hamilton R. R. Co.*, 23 Grant, (Can.) 383; *Crampton v. Zabriskie*, 101 U. S. 601; *Bayle v. New Orleans*, 23 Fed. Rep. 843; *Jacksonport v. Watson*, 33 Ark. 704; *Douglass v. Placerville*, 18 Cal. 643; *New London v. Brainard*, 22 Conn. 552; *Webster v. Harwinton*, 32 Conn. 131; *Terrett v.*

Sharon, 34 Conn. 105; *Murphy v. Jacksonville*, 18 Fla. 318; *Drake v. Phillips*, 40 Ill. 388; *Sherlock v. Winnetka*, 59 Ill. 389; *Board of Education v. Arnold*, 112 Ill. 11; *Oliver v. Keightley*, 24 Ind. 514; *Grant Co. v. Bradford*, 72 Ind. 455; *Madison v. Smith*, 83 Ind. 502; *Sackett v. New Albany*, 88 Ind. 473; *Grant v. Davenport*, 36 Iowa, 396; *Brockman v. Creston*, 79 Iowa, 587; *Henderson v. Covington*, 14 Bush, (Ky.) 312; *Patton v. Stephens*, 14 Bush, (Ky.) 324; *Handy v. New Orleans*, 39 La. An. 107; *Peter v. Prettyman*, 62 Md. 566; *Stetson v. Kempton*, 13 Mass. 272; *Clafin v. Hopkinton*, 4 Gray, (Mass.) 502; *Hood v. Lynn*, 1 Allen, (Mass.) 103; *Hooper v. Ely*, 46 Mo. 505; *Hitchcock v. St. Louis*, 49 Mo. 484; *Follmer v. Nuckolls Co.*, 6 Neb. 204; *Normand v. Otoe Co.*, 8 Neb. 18; *Merrill v. Plainfield*, 45 N. H. 126; *Gifford v. N. J. R. R. Co.*, 10 N. J. Eq. 171; *Roberts v. Mayor*, 5 Abb. Pr. (N. Y.) 41; *Sank v. Phila.*, 4 Brewst. (Pa.) 133; *Page v. Allen*, 58 Pa. 338; *Sherman v. Carr*, 8 R. I. 431; *Austin v. Coggeshall*, 12 R. I. 329; *Stevens v. R. R. Co.*, 29 Vt. 545; *Wade v. Richmond*, 18 Gratt. (Va.) 583; *List v. Wheeling*, 7 W. Va. 501; *contra*, in Massachusetts: *Baldwin v. Wilbraham*, 140 Mass. 459; but see *Clafin v. Hopkinton*, 4 Gray, (Mass.) 502. Thus, a taxpayer may sue to prevent the enforcement of an ordinance granting an illegal franchise: *Cincinnati St. R. R. Co. v. Smith*, 29 Ohio St. 291; one entering into an illegal contract; *e. g.*, one that will create an indebtedness beyond the legal limit, or that is wasteful and extravagant: *Stevens v. St. Mary's Training School*, 144 Ill. 336; *Noble v. Vincennes*, 42 Ind. 125; *Valparaiso v. Gardner*, 97 Ind. 1; *Conery v. Waterworks Co.*, 39 La. An. 770; *Davenport v. Kleinschmidt*, 6 Mont. 502; *Spilman v. Parkersburg*, 35 W. Va. 605; one that will create a nuisance: *Mayor v. Jaques*, 30 Ga. 506; one creating an illegal tax: *Verdery v. Summer-ville*, 82 Ga. 138; one to guaranty the payment of railroad bonds: *Goddard v. Providence*, 18 R. I. 536; or one to buy land in abuse of the corporate powers: *Place v. Providence*, 12 R. I. 1. If, however, the injury is not direct, but a mere contingency, he must wait until it happens before bringing suit: *Searle v. Abraham*, 73 Iowa, 507. In *Dodge v. Council Bluffs*, 57 Iowa, 560, an ordinance provided that if a special tax, authorized by law, should prove insufficient for its purpose, the

deficit should be paid out of the current annual revenues. A bill filed to restrain such payment was dismissed on the ground that it was not yet certain whether there would be any deficit, and the action was therefore premature.

5. Injunction to Restrain Enforcement of Penal Ordinance.—A court of equity has no power to restrain criminal proceedings, unless they are instituted by a party to a suit already pending before it, and for the purpose of trying the same right that is in issue there: *Mayor v. Pilkington*, 2 Atk. 302; *Montague v. Dudman*, 2 Ves. Sen. 396; *Atty. Gen. v. Cleaver*, 18 Ves. 211; *Turner v. Turner*, 15 Jur. 218; *Saull v. Browne*, 10 L. R. Ch. 64; *Kerr v. Preston*, 6 Ch. D. 463; *Portis v. Fall*, 34 Ark. 375; *Medical Inst. v. Hot Springs*, 34 Ark. 559; *Gault v. Wallis*, 53 Ga. 675; *Garrison v. Atlanta*, 68 Ga. 64; *Crichton v. Dahmer*, 70 Miss. 602; and therefore a criminal prosecution under an ordinance, though it be alleged to be void, will not be restrained: *Waters Peirce Oil Co. v. Little Rock*, 39 Ark. 412; *Phillips v. Mayor*, 61 Ga. 386; *Skakel v. Roche*, 27 Ill. App. 423; *Golden v. Guthrie*, 3 Okl. 128; and an officer will not be enjoined from making a threatened arrest, on the ground that it would interfere with the complainant's business: *Davis v. American S. P. C. A.*, 75 N. Y. 362. So, a proceeding to recover a penalty imposed for the violation of a municipal ordinance, intended for the protection of persons and property, or the preservation of peace and good order, though civil in form, is nevertheless quasi-criminal, and falls within this rule: *Moses v. Mayor*, 52 Ala. 198; *Poyer v. Des Plaines*, 123 Ill. 111; *Kansas City Cable Ry. Co. v. City of Kansas*, 29 Mo. App. 89; *Morris Canal & Bkg. Co. v. Mayor*, 12 N. J. Eq. 252; *West v. Mayor*, 10 Paige Ch. (N. Y.) 539; *Wardens v. Washington*, 109 N. C. 21; though it has been held in Texas that an injunction will lie to restrain the enforcement of a void penal ordinance, even though no proceedings have been taken to enforce it, and though there is a legal remedy; for as long as it remains undisturbed it acts *in terrorem*: *Austin v. Austin Cem. Assn.*, 87 Tex. 330; see *Wardens v. Washington*, 109 N. C. 21; but after the ordinance has been declared void by a court of competent jurisdiction, subsequent suits thereunder may be enjoined: *Taylor v. Pine Bluff*, 34

Ark. 603; *Marvin Safe Co. v. Mayor*, 38 Hun, (N. Y.) 146; and when a prosecution for the violation of an ordinance tends to impair vested rights, to inflict irreparable injury without authority of law, or to lead to a multiplicity of suits, it may be enjoined: *Platte & D. Canal & Milling Co. v. Lee*, 2 Colo. App. 184; *Rushville v. Rushville Natural Gas Co.*, 132 Ind. 575. Thus, equity will restrain the enforcement of an invalid ordinance making it a misdemeanor to buy or sell certain articles, except in a certain manner, though its validity has not yet been determined at law: *Sylvester Coal Co. v. St. Louis*, 130 Mo. 323. When, as is often the case, an ordinance prescribes a penalty for every repetition of an offence, the prosecution of all suits but one will be restrained until that one is determined: *Trustees of Louisville v. Gray*, 1 Litt. (Ky.) 147; or, if it involves a claim of property right, until the right of the complainant to do the act is determined at law: *Shinkle v. Covington*, 83 Ky. 420. In *Third Avenue R. R. Co. v. Mayor*, 54 N. Y. 159, the city had commenced seventy-seven actions against the plaintiff to recover penalties prescribed and imposed by ordinance, for running cars without a license. The plaintiff then sued for an injunction to restrain the city officers from the prosecution of more than one of those actions until that one could be finally heard and determined. The defendants demurred; but their demurrer was overruled, and judgment rendered for the plaintiff. This decision was affirmed. But in Chicago, *Burlington & Quincy R. R. Co. v. Ottawa*, 148 Ill. 397, the court held that the rule as to multiplicity of suits did not apply when they were all against the same defendant, (an absurd proposition, and utterly untenable,) and refused to enjoin all but one of thirteen pending prosecutions.

6. Injunction to Enforce Municipal Ordinances.—Equity will not enforce a municipal ordinance by injunction at the suit of the corporation, unless there exists some other ground of equitable interference, for the enforcement of ordinances is not one of the functions of a court of chancery: *Finegan v. Allen*, 46 Ill. App. 553; *contra*, *Winthrop v. Farrar*, 11 Allen, (Mass.) 398. Accordingly, it will not enjoin the violation of an ordinance declaring certain things to be nuisances; *e. g.*, the opening of a stone quarry: *Warren v. Cavanaugh*, 33 Mo. App. 102;

or the collection of garbage: *Philadelphia v. Lyster*, 3 Pa. Super. Ct. 475; or the erection and maintenance of a boarding or livery stable, or the like, in the residence portion of a municipality: *Sheldon v. Weeks*, 51 Ill. App. 314; unless they are nuisances *per se*: *Watertown v. Mayo*, 109 Mass. 315. So, an injunction will not lie at the suit of a municipal corporation to restrain the erection of a wooden building in violation of a fire ordinance: *Ward v. Little Rock*, 41 Ark. 526; *Marini v. Graham*, 67 Cal. 130; *St. Johns v. McFarlan*, 33 Mich. 72; *Mayor v. Smyth*, 64 N. H. 380; *Hutchinson v. Board of Health*, 39 N. J. Eq. 569; *Mayor v. Thorne*, 7 Paige Ch. (N. Y.) 261; *Brockport v. Johnston*, 13 Abb. N. C. (N. Y.) 468; *New Rochelle v. Lang*, 27 N. Y. Suppl. 600; *Williamsport v. McFadden*, 15 W. N. C. (Pa.) 269; *Honesdale Borough v. Weaver*, 2 D. R. (Pa.) 344; *Waupun v. Moore*, 34 Wis. 450; *Janesville v. Carpenter*, 77 Wis. 288; or to compel the removal of one already erected: *Ellwood City v. Mani*, 16 Pa. C. C. 474; unless it is a nuisance *per se*. But when it is shown that the erection of a building, if permitted, will be in express violation of a valid municipal ordinance, although it would not be a nuisance *per se*, any individual who shows that fact, and shows in addition that its erection will work special and irreparable injury to him and his property, is entitled to relief by injunction: *First Natl. Bk. of Mt. Vernon v. Sarlls*, 129 Ind. 201; see, however, *Rice v. Jefferson*, 50 Mo. App. 464; and property owners may restrain the removal of such a building into their neighborhood, and may also restrain the city and its officers from granting a permit to so remove it: *Griswold v. Brega*, 160 Ill. 490, affirming 57 Ill. App. 554; *Kaufman v. Stein*, 138 Ind. 49. After the building has once been built or removed, however, its maintenance will not be enjoined, nor its removal ordered, at the suit of an adjacent proprietor: *McCloskey v. Kreling*, 76 Cal. 511.

**Light and Air—Obstruction—Adjoining Landowners—
Blocking Windows—Malice—Removal of Fence.**

LETTS v. KESSLER.

(Supreme Court of Ohio. January 21, 1896.)

(54 Ohio St. 73 ; 42 N. E. Rep. 765. Reversing 7 Ohio Cir.
Ct. 108.)

In the United States, an easement of light and air cannot be acquired by prescription.

The motive of one who exercises a legal right will not be inquired into.

L. and K. owned adjoining lots, and L. erected on his lot a board fence reaching to the roof of K.'s house, which stood on the line of the two lots. This fence shut off light and air from the windows of the house of K., to its injury, and was erected by L. for no useful or ornamental purpose, but from motives of unmixed malice towards K. In an action by K. against L. to compel the removal of the fence, *held*, that L. had a legal right to erect and maintain such fence, and that neither law nor equity could compel its removal.

Error to Circuit Court, Cuyahoga county.

The plaintiff below (defendant in error here) filed her petition in the court of common pleas against defendant below (plaintiff in error here), averring that she was the owner by purchase under a land contract of certain premises in the city of Cleveland ; that defendant owned and occupied the lot on the east side thereof ; that she used her premises as an hotel and boarding-house ; that he was erecting a high board fence on his ground, which would obstruct her windows, and deprive her of light and air ; that said fence was not being erected for any useful or ornamental purpose, but from motives of pure malice alone, and for the express malicious purpose of annoying plaintiff, and excluding light and air from her house, so as to render her house uninhabitable, to injure the value thereof ; and that

said fence would exclude the light and air, and thereby greatly injure the value of her house. She prayed that he might be restrained from completing said fence, and that, upon the final hearing, a mandatory injunction might compel its removal. Defendant below demurred to this petition, and the demurrer was overruled, and exceptions taken. The ruling upon this demurrer is reported in 7 Ohio Cir. Ct. R. 108. He then filed an answer, in substance a general denial, with an averment that the fence was erected to prevent the rush of water and eave drip from her premises onto his. This she denied in her reply. The case went to the circuit court on appeal, and that court overruled the demurrer, and on the trial made a finding of facts containing in substance the allegations of the petition. The following is the finding of facts and the judgment: "This cause came on to be heard upon the petition of the plaintiff, the answer of defendant, the reply of the plaintiff thereto, and the testimony, and the court being requested by the defendant to make a finding of facts in the case, finds the conclusions of fact as follows: That the plaintiff owns and occupies premises situated on Lake street, in the city of Cleveland, known as 'The Osborn,' and said plaintiff owned and occupied said premises at the time of the erection of the structure hereinafter described. Said premises were used by plaintiff as a boarding-house. Defendant owns and occupies premises adjoining plaintiff on the east. Between the two houses is a driveway and open space about twenty feet wide. Plaintiff and defendant had litigation in May, 1891, on account of defendant having attached a shed roof to her building without consent of said plaintiff. About two weeks after the trial of said lawsuit, the defendant took down said shed or roof, and built up against the house of said plaintiff a tight-board fence. The said fence was eighty-six feet long. The scantlings were placed against the wall of said plaintiff's house, and reached up under the eaves of the same. Boards were nailed on to

said scantlings, beginning about two feet from the ground, and extending to the sills of the second-story windows. Defendant nailed on to the rear portion of said fence, and extending about forty feet towards the front, a shed or roof. Under this shed or roof defendant had lumber piled. Said board fence completely covered up the bathroom, kitchen, bedroom and library windows, rendering said portion of house dark, damp and uninhabitable, and causing a substantial damage to the same. Said structure was erected upon the land of the defendant, and belonged to him. The structure was erected by said defendant from motives of un-mixed malice towards said plaintiff, and for no useful or ornamental purposes of the property of said defendant, except said shed or roof, and its back wall below the shed roof, which may subserve some useful purpose of defendant in the use of his property by protecting his lumber piled thereunder. The court, upon the foregoing facts, finds and decrees that said defendant be, and is hereby, enjoined from proceeding further with the erection of said fence. Adjudged and decreed that said defendant, within twenty days from the entering of this decree, take down all of said fence and scantling projecting above the roof of said shed, and all the remainder of said fence outside of and beyond said shed; and it is considered that the plaintiff recover his costs expended in the case, taxed at \$——, and that the defendant pay his own costs, for which it is ordered that execution issue—to all of which the defendant excepts." A motion for a new trial was made, overruled, and exceptions taken. Thereupon a petition in error was filed in this court to reverse the judgment of the circuit court. Reversed.

L. A. Wilson and Edward David, for plaintiff in error.—When we let down the bars and begin to inquire into men's motives, we enter upon dangerous ground. The law is that the motive makes no difference: *Frazier v. Brown*, 12 Ohio St. 294. The act, to wit, the use of his own property being

lawful in itself, the motive with which the act was done is a matter of indifference: *Mullen v. Stricker*, 19 Ohio St. 135.

An easement of light and air, to be supplied to one's windows from the premises of another, cannot be acquired in Ohio, by use or prescription: *Washburn on Easements*, 2d ed. top p. 458—star p. 380, chapter on rights in subterranean waters.

We claim the fence in the case at bar is not a nuisance: *Falloon v. Schilling*, 29 Kans. 292.

If the improvement itself is legitimate and lawful, is not *per se* a nuisance, the law will not inquire into the motives with which he acts. It is true the law will interfere to prevent the erection of a nuisance, such as a stable, outbuildings, etc., but not to prevent the erection of a store, tenement or anything of that nature; even where the building may or may not become a nuisance, according to the manner in which it is used, the erection of the building will not be restrained: *High on Injunctions*, § 438.

We find no case in which a party seeking to place an improvement upon his own land, an improvement which will increase his income, which improvement is not a nuisance, which does not endanger the physical health or comfort of his neighbor, but is disagreeable to such neighbor, will be enjoined therefrom, though it does not correspond in character and kind with the improvement on such neighbor's premises, and though it will bring a different class of people socially into immediate proximity to his neighbor, and though all this was done or intended through spite against such neighbor: *Mahan v. Brown*, 13 Wend. (N. Y.) 261; *Greenleaf v. Francis*, 18 Pick. (Mass.) 117.

It was a lawful act, and although it may have been prejudicial to the plaintiff, it is *damnum absque injuria*: *Chatfield v. Wilson*, 28 Vt. 49; *Quintini v. Aldermen*, 60 Am. Rep., 64 Miss. 483.

A private dwelling may not be declared a nuisance by authority of the legislature, simply because it may injure

adjoining property by cutting off the breeze from, and view of the sea: *Radcliff v. Mayor, etc.*, of Brooklyn, 4 N. Y. 195; 53 Am. Dec. 357.

But a man may do many things under lawful authority, or on his own land, which may result in an injury to the property of others, without being answerable for the consequences. Indeed, an act done under lawful authority, if done in a proper manner, can never subject the party to an action, whatever consequences may follow. Nor will a man be answerable for the consequences of enjoying his own property in the way such property is usually enjoyed, unless an injury has resulted to another from the want of proper care or skill on his part. The maxim: "So use your own as not to injure another's property," extends only to legal injuries, and does not condemn the darkening of another's windows, or depriving him of a prospect, by building on one's own land, where no right has been acquired by grant or prescription: *Pickard v. Collins*, 23 Barb. (N. Y.) 444; *Pierre v. Fernald*, 26 Me. 436; 46 Am. Dec. 573; *Humphrey v. Douglass*, 11 Vt. 22.

The motive with which a lawful act is done, can never alter the character of such an act. The plaintiff's testimony tended to prove that the defendant acted with improper motives. This can never alter the character of a lawful act. Whatever a man has a legal right to do, he may do with impunity, regardless of his improper motives: *Pitts., Ft. W. & C. R. W. Co. v. Bingham, Admx.*, 29 Ohio St. 364.

Where no right has been invaded, although one has been injured, no liability has been incurred; and any other rule would be manifestly wrong: *Mullen v. Stricker*, 19 Ohio St. 135; *Frazier v. Brown*, 12 Ohio St. 294.

C. J. Estep and *S. S. Ford*, for defendant in error.—We do not insist that when a person is putting his property to some useful or ornamental purpose, however small, that we can inquire into his motives. The doctrine we desire to see

established as the law of Ohio, is that a person cannot under cover of ownership of a piece of real estate, use that real estate for the purpose of erecting structures thereon, which subserve no useful or ornamental purpose, and are erected through motives of unmixed malice towards his adjoining neighbor.

It is true that plaintiff in error can find cases that hold that an act legal in itself, violating no legal right, cannot be made actionable even though it be prompted by malice and is prejudicial to his neighbor. But many courts have held that if one does an act, wholly on his own land, legal but prejudicial to his neighbor, not for his own ornament, but through unmixed malice to his neighbor, then he has done an injury which is actionable: 74 Me. 164; 7 House of Lords, 387; 18 Pick. 117; 25 Penn. 548; 20 Conn. 533; 29 Pa. St. 559.

We also do not contend that in Ohio we can acquire by use or prescription an easement in light and air to be supplied to one's windows from the premises of another. A person in the proper use of his own premises, for use, ornament or other good purpose, may erect buildings or structures, up to his line, doing no unnecessary damage to his neighbor, even if it closes up his neighbor's windows or darkens them. The doctrine we contend for is not inconsistent with the law as we concede it to be, when we assert that a man cannot, being actuated by malice alone, and with the purpose of annoying his neighbor, and rendering his property undesirable, and subserving no useful or ornamental purpose, erect a structure to close up his windows: *Peck v. Bowman*, 22 Wkly. Law Bull. (Ohio,) 111.

The most instructive case on the subject under discussion, and the one which sustains our position in every particular, is the case of *Burke v. Smith*, 69 Mich. 380. In that case the civil law recognizes the moral law, and does not permit the owner of land to do an act upon his own premises for the express purpose of injuring his neighbor when the act

brings no profit or advantage to himself. The law furnishes redress because the injury is malicious and unjustifiable. The moral law imposes upon every man the duty of doing unto others as he would that they should do unto him; and the common law ought to, and in our opinion does, require him to use his own privileges and property so as not to injure the rights of others maliciously and without necessity.

BURKET, J. (after stating the facts.)—The only question in this case arises upon the following findings of fact by the circuit court: "Said structure was erected upon the land of the defendant, and belonged to him. The structure was erected by said defendant from motives of unmixed malice towards said plaintiff, and for no useful or ornamental purposes of the property of said defendant." It is not claimed that the person of the plaintiff was interfered with in this case, so that we have for consideration only the rights of property. The fence complained of is upon the land of the defendant, and belongs to him. Plaintiff fails to aver, and the court fails to find, that she has any right to or upon the lot of defendant below by contract, statute or any other way known to the law for acquiring a right to, in or upon lands, unless such right may be acquired by, and transferred to her, by means of the aforesaid "motives of unmixed malice." This is a manner of acquiring, on the one hand, and of transferring, on the other, a right to property unknown to the law. But it is urged in her behalf that even if she had no right of property, and even if he was the owner of the lot, he could not use his own land for the purpose of erecting structures thereon which subserve no useful or ornamental purpose, and are erected through motives of unmixed malice towards his adjoining neighbor. It is and must be conceded that he might, by erecting a building on his lot, shut off her light and air to exactly the same extent as is done by this fence, and that in such case she would be without right and without remedy, even though done with

the same feelings of malice as induced him to erect the fence; thus making his acts lawful when the malice is seasoned with profit, or some show of profit, to himself, and unlawful when his malice is unmixed with profit, the injury or inconvenience to her meanwhile remaining the same in both cases. If, through feelings of malice, he desires to shut the light and air from her windows, it is nothing to her whether he makes a profit or loss thereby. Her injury is no greater and no less in the one case than in the other. As to her it is the effect of the act, and not the motive. In effect, he has the right to shut off the light and air from her windows by a building on his own premises; and she is not, in effect, concerned in the means by which such effect is produced, whether by a building or other structure; nor is she concerned as to the motive, nor as to whether he makes or loses by the operation. In the one case she might have a strong suspicion of his malice, while in the other such suspicion would be reduced to a certainty. But this is nothing to her as affecting a property right. As long as he keeps on his own property, and causes an effect on her property which he has a right to cause, she has no legal right to complain as to the manner in which the effect is produced; and to permit her to do so would not be enforcing a right of property, but a rule of morals. It would be controlling and directing his moral conduct by a suit in equity—by an injunction. To permit a man to cause a certain injurious effect upon the premises of his neighbor by the erection of a structure on his own premises if such structure is beneficial or ornamental, and to prohibit him from causing the same effect in case the structure is neither beneficial nor ornamental, but erected from motives of pure malice, is not protecting a legal right, but is controlling his moral conduct. In this state a man is free to direct his moral conduct as he pleases, in so far as he is not restrained by statute. But it is said that such acts are offensive to the principles of equity. Not so. There is no conflict between

law and equity in our practice, and what a man may lawfully do cannot be prohibited as inequitable. It may be immoral, and shock our notions of fairness, but what the law permits equity tolerates. It would be much more inequitable and intolerable to allow a man's neighbors to question his motives every time that he should undertake to erect a structure upon his own premises, and drag him before a court of equity to ascertain whether he is about to erect the structure for ornament or profit, or through motives of unmixed malice.

The case is not like annoying a neighbor by means of causing smoke, gas, noisome smells or noises to enter his premises, thereby causing injury. In such cases something is produced on one's own premises, and conveyed to the premises of another; but in this case nothing is sent, but the air and light are withheld. A man may be compelled to keep his gas, smoke, odors and noise at home, but he cannot be compelled to send his light and air abroad: *Mullen v. Stricker*, 19 Ohio St. 135. If smoke, gas, offensive odors or noise pass from one's own premises to or upon the premises of another, to his injury, an action will lie therefor, even though the smoke, gas, odor or noise should be caused by the lawful business operations of defendant, and with the best of motives: *Broom*, Leg. Max. 372. In such cases it is the effect or injury, and not the motive, that is regarded. The true test is whether anything recognized by law as injurious passes from the premises of one neighbor to that of another. Anything so passing invades the legal rights of him whose premises it reaches, and such rights will be protected. But courts cannot regulate or control the moral conduct of a man, unless authorized so to do by statute.

The following cases, cited by plaintiff in error, bear more or less upon the question involved in this case, and seem to produce a decided weight of authority in his favor: *Frazier v. Brown*, 12 Ohio St. 294; *Falloon v. Schilling*, 29 Kans.

292; *Mahan v. Brown*, 13 Wend. (N. Y.) 261; *Greenleaf v. Francis*, 18 Pick. (Mass.) 117, 123; *Chatfield v. Wilson*, 28 Vt. 49. The following additional authorities are to the same effect: *Gould, Waters*, § 280, citing *Chasemore v. Richards*, 7 H. L. Cas. 349; *Dickinson v. Canal Co.*, 7 Exch. 282; *Acton v. Blundell*, 12 Mees. & W. 324; *Hammond v. Hall*, 10 Sim. 551; *Cooper v. Barber*, 3 Taunt. 99; *Balston v. Bensted*, 1 Camp. 463; *Galgay v. Railway Co.*, 4 Ir. C. L. 456; *Chase v. Silverstone*, 62 Me. 175; *Roath v. Driscoll*, 20 Conn. 533; *Brown v. Illius*, 27 Conn. 84; *Ocean Grove Camp Meeting Assn. v. Asbury Park Comrs.*, 40 N. J. Eq. 447, 3 Atl. Rep. 168; *Taylor v. Fickas*, 64 Ind. 167; *Village of Delhi v. Youmans*, 45 N. Y. 362; *Dexter v. Aqueduct Co.*, 1 Story, (U. S.) 387, Fed. Cas. No. 3,864; *Wheatley v. Baugh*, 25 Pa. St. 528, 64 Am. Dec. 721, note; *Haugh's Appeal*, 102 Pa. St. 42, 48 Am. Rep. 193, note; *Haldeman v. Bruckhart*, 45 Pa. St. 514; *Coleman v. Chadwick*, 80 Pa. St. 81; *Trout v. McDonald*, 83 Pa. St. 144; *Lybe's Appeal*, 106 Pa. St. 626; *Smith v. Adams*, 6 Paige Ch. (N. Y.) 435; *Elster v. Springfield*, 49 Ohio St. 82, 30 N. E. Rep. 274; *Ellis v. Duncan*, cited in 29 N. Y. 466; *Radcliff v. Mayor, etc.*, 4 N. Y. 195, 200; *Pixley v. Clark*, 35 N. Y. 520; *Goodale v. Tuttle*, 29 N. Y. 466; *Bliss v. Greeley*, 45 N. Y. 671; *Clark v. Conroe*, 38 Vt. 469; *Taylor v. Welch*, 6 Oreg. 198; *Mosier v. Caldwell*, 7 Nev. 363; *Railway Co. v. Peterson*, 14 Ind. 112; *Bassett v. Manufacturing Co.*, 43 N. H. 569; 30 Cent. Law J. 269; 23 Am. Law Rev. 376; *Davis v. Afong*, 5 Hawaii, 216. The defendant in error cites the cases reviewed in *Frazier v. Brown*, 12 Ohio St. 294, and also the case of *Burke v. Smith*, 69 Mich. 380, 37 N. W. Rep. 838. Most of the cases cited are cases arising out of interference with wells, springs and percolating waters. Such cases bear but slightly upon the question. The Michigan case is substantially like the case under consideration. In that case the lower court enjoined the defendant, and that judgment was affirmed by an equally divided court. The syllabus says

that, the court being equally divided, nothing is decided. As nothing was decided, the case is not an authority on either side of the question.

But it is strongly urged by counsel for defendant in error that the maxim, "Enjoy your own property in such a manner as not to injure that of another person," applies in such cases as this, and that, as it must be conceded that the fence in question is an injury to the property of defendant in error, his acts are in conflict with the above maxim. At first blush, this would seem to be so, but a careful consideration shows the contrary. The maxim is a very old one, and states the law too broadly. In this case, for instance, it is conceded that the plaintiff in error had the right to enjoy his property by erecting a house so as to do the same injury which was done by the fence, and that, while that would be an injury to the property of defendant in error, she would be without remedy, and his act in erecting such house would not be regarded as violating the maxim. In *Jeffries v. Williams*, 5 Exch. 792, it was claimed, and in *Railroad Co. v. Bingham*, 29 Ohio St. 369, it was held, that the true and legal meaning of the maxim is: "So use your own property as not to injure the rights of another." *BOYNTON*, J., in that case says: "Where no right has been invaded, although one may have injured another, no liability has been incurred. Any other rule would be manifestly wrong." The maxim should be limited to causing injury to the rights of another, rather than to the property of another, because for an injury to the rights of another there is always a remedy; but there are injuries to the property of another for which there is no remedy, as in draining a spring or well, or cutting off light and air or a pleasant view by the erection of buildings, and many other cases which might be cited. Thus limiting the maxim to the rights of the defendant in error, it is plain that the acts of plaintiff in error in the use which he made of his property did not injure any legal right of hers,

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and that, therefore, what he did was not in violation of such maxim.

The circuit court erred in overruling the demurrer to the petition, and in rendering judgment in favor of defendant in error upon the facts as found by the court. The judgment of the circuit court is therefore reversed, and, proceeding to render such judgment as the circuit court should have rendered upon the facts found, the petition of plaintiff below is dismissed, at her cost. Judgment reversed.

Light and Air—Obstruction—Municipal Corporations—Control of Parks—Permit to Build—Injunction—Discretion of Court.

WORMSER ET AL. v. BROWN ET AL.

(Court of Appeals of New York. April 7, 1896.)

(149 N. Y. 163; 43 N. E. Rep. 524. Affirming 73 Hun, 93; 25 N. Y. Suppl. 553.)

Under Laws N. Y. 1882, c. 410, § 688, giving the department of public parks power to control surface constructions on any street within three hundred and fifty feet of the public park, it is within the power of the department to permit the erection of a residence on such a street with bay windows extending beyond the building line, but within the stoop line of said street.

On application for an injunction on the ground that a structure erected by defendant interferes with plaintiff's light, air and view, where there is a finding that it does so interfere, but no finding or proof that plaintiff sustains substantial damage thereby, it is wholly within the discretion of the trial court to deny the injunction, and its judgment will not be disturbed on appeal.

Appeal from Supreme Court, General Term, First Department.

Action by Simon Wormser and Isidor Wormser against

John Nicholas Brown, Harold Brown and George W. R. Matteson, as trustees for Sophia Augusta Sherman, and said Sophia Augusta Sherman, to restrain the completion of certain bay windows as part of a house erected on a lot adjoining plaintiff's premises. From a judgment dismissing the complaint, (73 Hun, 93; 25 N. Y. Suppl. 553, 1124,) plaintiffs appealed. Affirmed.

George Hoadly and Louis W. Wormser, for appellants.—The finding of the special term that the erection of the bay windows interferes in a substantial degree with the light and air coming to the plaintiff's house and affects the same remaining unimpaired, and not even excepted to, and without impeachment by cross-appeal or otherwise, as matter of law, leaves the defendants without any legal excuse for their acts: *Stillwell v. M. L. I. Co.*, 72 N. Y. 385; *Sickles v. Flanagan*, 79 N. Y. 224; *Hallock v. Scheyer*, 33 Hun, (N. Y.) 111; *Callanan v. Gilman*, 107 N. Y. 360; *White's Bank of B. v. Nichols*, 64 N. Y. 65; *Cunningham v. Fitzgerald*, 138 N. Y. 165; *In re Adams*, 141 N. Y. 297; *Story v. N. Y. E. R. R. Co.*, 90 N. Y. 122; *Abendroth v. M. Ry. Co.*, 122 N. Y. 1; *Powers v. M. Ry. Co.*, 120 N. Y. 178. The attempt to convert the plaintiff's property to private uses, even if authorized by legislative authority, would be unconstitutional and void, and the attempt to convert it to public uses without compensation would, in like manner, be unconstitutional: *Kane v. N. Y. El. R. R. Co.*, 125 N. Y. 164; *Abendroth v. M. Ry. Co.*, 122 N. Y. 1; *Kellinger v. 42d St. & G. St. F. R. R. Co.*, 50 N. Y. 206; *Reining v. N. Y., L. & W. R. Co.*, 128 N. Y. 157; *Taylor v. Porter*, 4 Hill, (N. Y.) 140; *In re Albany Street*, 11 Wend. (N. Y.) 149; *People v. Morris*, 13 Wend. (N. Y.) 325; *In re John & Cherry streets*, 19 Wend. (N. Y.) 659, 676; *Varick v. Smith*, 5 Paige Ch. (N. Y.) 137; *Embury v. Conner*, 3 N. Y. 511. Plaintiffs are entitled to the remedy they seek by injunction: *Uline v. N. Y. C. & H. R. R. R. Co.*, 101 N. Y. 98; *Galway v. M. E. Ry. Co.*, 128

N. Y. 132; *Rumsey v. N. Y. & N. E. R. R. Co.*, 133 N. Y. 79; *Pappenheim v. M. E. Ry. Co.*, 128 N. Y. 436.

John L. Cadwalader, for respondents.—The park department had complete authority to give permission to erect the bay windows in question, and has in due form exercised that authority: Laws of 1882, chap. 410, §§ 84, 86, 688; Laws of 1873, chap. 850, § 1; *Hoey v. Gilroy*, 129 N. Y. 132; *People v. Charbineau*, 115 N. Y. 433; Laws of 1888, chap. 115; *People ex rel. v. B. & O. R. R. Co.*, 117 N. Y. 150; *Jorgensen v. Squires*, 144 N. Y. 280; *Garrett v. Janes*, 65 Md. 260; *Goldstraw v. Duckworth*, 5 Q. B. D. 275. The court will take judicial notice of the facts bearing upon this case: *King v. Gallun*, 109 U. S. 99; *Babbage v. Powers*, 130 N. Y. 281, 291; *Brown v. Piper*, 91 U. S. 37; *Terhune v. Phillips*, 99 U. S. 592; *Ah Kow v. Nunan*, 5 Sawy. (U. S.) 552; *Slater v. Jewett*, 85 N. Y. 61; *E. C. & B. Co. v. Avery*, 83 N. Y. 31; *Bookman v. N. Y. E. R. R. Co.*, 137 N. Y. 302; *Frace v. N. Y., L. E. & W. R. R. Co.*, 143 N. Y. 182; *Skelly v. N. Y. E. R. R. Co.*, 7 Misc. Rep. (N. Y.) 88. While, if there was power in the department of parks to authorize the erection of the bay windows, there is, of course, no power in the court to enjoin such erection, nevertheless, if there had been no such power so to do, and a permit had been granted, a court of equity in this case, in view of all the facts, would not grant an injunction: *Trustees of C. College v. Thacher*, 87 N. Y. 311; *Health Department v. Purdon*, 99 N. Y. 237; *Gray v. M. Ry. Co.*, 128 N. Y. 499; *Clarke v. R. L. & N. F. R. R. Co.*, 18 Barb. (N. Y.) 350; *Peters v. Delaplaine*, 49 N. Y. 362; *Welsh v. Taylor*, 50 Hun, (N. Y.) 137; 1 High on Injunc. (2d ed.) § 13; *Woodruff v. Paddock*, 130 N. Y. 618; *Brush v. M. Ry. Co.*, 26 Abb. N. C. (N. Y.) 73. The court will always endeavor to reconcile and explain any supposed inconsistencies in findings if, by so doing, the judgment may be sustained: *Bennett v. Bates*, 94 N. Y. 354; *Health Depart-*

ment v. Purdon, 99 N. Y. 237; Green v. Roworth, 113 N. Y. 462; Sheldon v. Sherman, 42 N. Y. 484; Newman v. Frost, 52 N. Y. 422; Caswell v. Davis, 58 N. Y. 223; Meyer v. Lathrop, 73 N. Y. 315; Everson v. City of Syracuse, 100 N. Y. 577; Ostrander v. Hart, 130 N. Y. 406; Ogden v. Alexander, 140 N. Y. 356; First National Bank v. Chalmers, 144 N. Y. 432.

MARTIN, J.—Since the 30th of September, 1876, the plaintiffs have been the owners of a lot on the east side of Fifth avenue, in the city of New York, which is twenty-five feet in width, one hundred feet in depth, and upon which there is a four-story building, occupied by them as a residence. The three defendants who are described as trustees are the owners of two lots on the same avenue, fifty feet in front, one hundred feet in depth, which adjoin the property of the plaintiffs, and extend to the southeast corner of Sixty-Fifth street. Fifth avenue is one hundred feet in width, and was opened in 1838. The front of the plaintiffs' and defendants' lots is on the easterly line of the avenue, and opposite Central Park. The premises in that vicinity are principally used for residential purposes, and their proximity to the park adds to the value of the property for that purpose. Several months prior to this action the defendants commenced the erection of a building upon their lots, which included two bay windows extending six feet beyond the easterly building line, but within the stoop line of the street. On the 9th of March, 1892, the commissioners of public parks granted the defendants a permit to erect such windows. The consent of the fire department was also obtained. Thereupon the defendants proceeded with the construction of their buildings and bay windows, in accordance with the permit granted. No opposition to their erection was made by the plaintiffs until the following November. This action was commenced about November 11, 1892, to restrain the defendants from erecting or maintaining the windows in

question. The trial judge found that the erection of the windows interfered to a substantial degree with the light and air coming to the plaintiffs' house, and affected the same, and that they affected and interfered with certain views from its windows. But he refused to find that the view, light and air added greatly to the value of the premises, or that any obstruction or interference therewith was a special, great or irreparable injury to the enjoyment of the plaintiffs' premises, or that it very considerably affected the value thereof. He also declined to find that by reason of the construction of such windows the plaintiffs' premises were deprived of light and air, and of a view from the front windows, as the same had been theretofore enjoyed, or that the plaintiffs' claimed rights had been interfered with, impaired or obstructed, or that the plaintiffs would thereby suffer irreparable damage in respect of their premises. As conclusions of law he held that the commissioners of the department of public parks had full power and authority to issue the permit granted by them, and to allow the defendants to erect such windows; that they did not constitute a nuisance or unlawful structure, but were duly authorized in accordance with law, and that the plaintiffs were not entitled to an injunction restraining their erection or completion. He thereupon directed a judgment dismissing the complaint on the merits, with costs. The judgment thus directed was affirmed by the general term of the supreme court, and from that judgment this appeal was taken.

The appellants contend that the department of public parks had no authority to grant the defendants the permit issued to them; that the power to grant such permit was vested in the common council alone; and hence that the building of the windows was wholly unauthorized and illegal. The question whether the permit issued to the defendants by the department of public parks was valid depends for its solution upon the provisions of the New York consolidation act (Laws 1882, c. 410). Section 688

provides: "The determination of the lines of curb and other surface constructions in all the streets and avenues within the distance of three hundred and fifty feet from the outer boundaries of any public park or place, which is now or hereafter may be under the control and management of the department of public parks, is vested in the said department; and the said department shall also have power to plant trees and to construct, erect and establish seats, drinking fountains, statues and works of art whenever they may deem it for the public interest so to do on the said parts of said public streets and avenues; and the said parts of said public streets and avenues shall at all times, after the same are opened, be subject to such rules and regulations in respect to the uses thereof and erections and projections thereon as the said department may make therefor." The defendants' premises, and the portion of Fifth avenue upon which they front, were within 350 feet of the outward boundaries of Central Park, which is under the control and management of the department of public parks, and, consequently, that department had the control over that portion of Fifth avenue given by that section of the statute. The language of the section is clearly broad enough to apply to a projection that may extend into any of the streets or parts thereof that are within the limits mentioned. That department is given the control of all the streets within those limits, and they are expressly made subject to such rules and regulations in relation to erections and projections thereon as it may make. That the defendants' windows are erections or projections, within the meaning of that section, there can be no doubt. So that, unless there is some other statute or valid ordinance which clearly indicates that § 688 was not intended to apply to such an erection or projection, it must follow that the authority to regulate them was vested in the department of public parks.

Thus we are led to inquire whether there is any other

provision of statute, or any ordinance of the city authorized by statute, which is so far inconsistent with the provisions of that section, or so specific in its terms, as to indicate a clear intent to limit the language of § 688, so that it should not include such a projection. The appellants insist that the general words of that section are limited by §§ 34 and 36 of the ordinances of the city, which prohibit any person from constructing any projection or bay window beyond the house line on any street, avenue or public place within the corporate limits of the city, unless permission therefor is given by the common council. Section 86 of the consolidation act, which confers upon the common council the only power it possesses to make ordinances upon this subject, provides: "The common council shall have power to make ordinances, not inconsistent with law and the constitution of this state, and with such penalties as are provided in the last section, in the matters and for the purposes following, in addition to other powers elsewhere especially granted, namely: . . . (4) To prevent encroachments upon and obstructions to the streets, highways, roads and public places, not including parks, and to authorize and require the commissioner of public works to remove the same; but they shall have no power to authorize the placing or continuing of any encroachment or obstruction upon any street or sidewalk, except the temporary occupation thereof. . . ." It will be observed that § 86 does not confer any authority upon the common council to make or enforce an ordinance that is in conflict or inconsistent with any existing law. An ordinance that is inconsistent with law is clearly not within the authority conferred upon the common council by § 86, and, consequently, if this ordinance was intended to affect the provisions of § 688 it would not, because, so far as it is inconsistent with that section, it is without authority of law, and hence inoperative. But it is not to be supposed that such was its purpose or intent. The common council had control over all the streets of the city, except such as were

within a specified distance of its parks and public places. As to the latter the control was conferred upon the department of public parks. If these ordinances are construed as relating to the streets which are under the control of the common council, they are given the effect that must have been intended, as it will not be presumed that the common council intended to pass an ordinance that was unauthorized, and which it had no power to make or enforce. Moreover, subdivision 4 of § 86 of the consolidation act does not authorize the common council to make ordinances to prevent encroachments or obstructions in public parks. They are excepted from the authority conferred upon the common council by that subdivision. By virtue of § 688 the streets that are within 350 feet of the boundary lines of Central Park are under the control of the department of public parks, and may well be regarded as a part thereof. Presumably the object of the provision of subdivision 4 of § 86, which excepted from the authority of the common council the power to make ordinances to prevent encroachments or obstructions in the parks, was to avoid any conflict between the council and the department of public parks; and that section was doubtless enacted with the fact in view that the streets in and around the parks, for the distance mentioned, were placed under the sole and exclusive control of the latter. When these provisions of the statute are read and considered together, it becomes obvious, we think, that it was the intent of the statute to exclude the parks, together with the streets in and around them, from the jurisdiction of the common council, and to place them under the exclusive control of the department of public parks. Again, that portion of the statute which relates to the parks and streets within 350 feet of their boundaries is special, and applies only to a specified class, which constitutes a very limited proportion of the streets of the city; while the ordinances and the statute in pursuance of which they were passed are general, and relate to all

the streets except those referred to in § 688. When a statute contains separate provisions, one special and the other general, the latter will not be construed as including the former, but the special statute will be regarded as in the nature of an exception to the general one: *Hoey v. Gilroy*, 129 N. Y. 132, 29 N. E. Rep. 85; *City of Poughkeepsie v. Quintard*, 136 N. Y. 275, 280, 32 N. E. Rep. 764. When so construed, the statutes and ordinances relating to this subject are in harmony, and effect is given to each. These considerations lead to the conclusion that the power to regulate the erections and projections upon Fifth avenue at the point where the plaintiffs' and defendants' buildings stands, rests in the department of public parks, and that the trial court properly held that the commissioners of that department had power to issue to the defendants a permit to erect the windows in question, and that they cannot be regarded as an unlawful obstruction or encroachment upon the street. The legislature, by virtue of its general control over public streets and highways, has power to authorize structures in the streets, which, without such authority, and under the common law, would be held to be encroachments or obstructions, and this power it may delegate to the governing body of a municipal corporation: *Hoey v. Gilroy*, 129 N. Y. 132, 29 N. E. Rep. 85; *People v. Baltimore & O. R. R. Co.*, 117 N. Y. 150, 155, 22 N. E. Rep. 1026; *Jorgensen v. Squires*, 144 N. Y. 280, 39 N. E. Rep. 373. In the case of *People v. Baltimore & O. R. R. Co.*, an action was brought to compel the defendant to remove a shed it had erected upon a pier, and to restrain it from continuing the use of it, or from placing upon the pier any structure which would be calculated to interfere with its use by the public. The defendant had obtained from the department of docks a permit to construct the shed, in pursuance of which it commenced and had nearly completed its erection, when an action was brought in the name of the people, upon the solicitation of private persons engaged in business in the vicinity,

to compel its removal. The permit granted by the dock department was based upon an act of the legislature allowing the maintenance of the pier where authority to do so had been obtained from that department. The pier was regarded as a public highway, and the shed or building could be closed and locked, so that it was an appropriation of the highway to a *quasi* private use. Yet in that case it was held that the shed could be legally constructed. In the Hoey case the action was to restrain the defendant, as an officer of the city charged with removing obstructions in the street, from removing an iron awning which covered the whole sidewalk, and extended beyond the curbstone twelve inches. It was built in conformity with an ordinance of the common council which was authorized by statute, and it was held in that case that the remedy for such use of the streets was with the city government, and not in the courts. In the Jorgensen case it was held that it was competent for the legislature to authorize a limited use of sidewalks in front of buildings for stoops, cellar openings or underground vaults for the more convenient and beneficial enjoyment of the adjacent premises. See, also, *Garrett v. Janes*, 65 Md. 260, 3 Atl. Rep. 597; *Butt v. Gas Co.*, 2 L. R. Ch. 158; *Goldstraw v. Duckworth*, 5 Q. B. Div. 275. As the bay windows erected by the defendants did not extend beyond the building line of the street a greater distance than the stoop upon the plaintiffs' adjoining property, and therefore there was no practical interference with the use of the street, it would seem that upon the authority of the cases cited the plaintiffs' complaint in this action was properly dismissed.

A further contention of the appellants is that, the trial court having found that the erection of the bay windows interfered to a substantial degree with the light and air coming to the plaintiffs' house, affected the same, and interfered with certain views from the windows, it follows, as a matter of law, that they are entitled to the relief demanded. It will be observed that this finding is very general. A

finding that the defendants' windows interfere with the light and air and affect the same is extremely indefinite, especially where there is no finding or proof that the plaintiffs have suffered, or will suffer, any pecuniary damage or material or irreparable injury by reason of the erection of such windows. Such a finding can hardly furnish a basis for judicial action, and is, we think, too uncertain to justify this court in interfering with the decision of the court below. An interference with the view from the plaintiffs' windows would not entitle them to the relief sought : *Aldred's Case*, 9 Coke, 57 b, 59 ; *Butt v. Gas Co.*, 2 L. R. Ch. 158. The trial court having decided upon the evidence before it that the plaintiffs were not entitled to an injunction against the defendants, and the general term having affirmed that decision, it should not, we think, be disturbed upon the ground that the judgment was inconsistent with that particular finding of fact.

We think there is another ground upon which the judgment of the general term should be affirmed. The granting or refusing of equitable relief by way of injunction depends to a great extent upon the particular facts in each case, and is largely discretionary with the court in which the action originates : *Jerome v. Ross*, 7 Johns. Ch. (N. Y.) 315 ; *Troy & B. R. R. Co. v. Boston, H. T. & W. Ry. Co.*, 86 N. Y. 107, 123 ; *Shepard v. M. Ry. Co.*, 131 N. Y. 215, 30 N. E. Rep. 187 ; *Doyle v. M. Ry. Co.*, 136 N. Y. 505, 511, 32 N. E. Rep. 1008 ; *Bookman v. N. Y. E. R. R. Co. & M. Ry. Co.*, 147 N. Y. 298, 41 N. E. Rep. 705 ; *Health Department v. Purdon*, 99 N. Y. 237, 1 N. E. Rep. 687 ; *Gray v. M. Ry. Co.*, 128 N. Y. 499, 509, 28 N. E. Rep. 498 ; *O'Reilly v. N. Y. E. R. R. Co. & M. Ry. Co.*, 148 N. Y. 347, 42 N. E. Rep. 1063. In the last case, where the question involved was the right of the plaintiff to an injunction against the operation of an elevated railroad, constructed in a public street in the city of New York by authority of law, this court held that it should not be granted at the suit of an abutting owner, on proof of

the wrongful appropriation of the easements of light, air and access, where the plaintiff failed to show any substantial monetary damage to his property or loss suffered by reason of the defendant's acts. In the Gray case it was said: "The amount of damage was thus quite material. Unless the court had found it to be substantial, it could, in the exercise of its discretion, have withheld the injunction, and left the plaintiff to his remedy at law. An equity court is not bound to issue an injunction when it will produce great public or private mischief merely for the purpose of protecting a technical or unsubstantial right: *McHenry v. Jewett*, 90 N. Y. 58; *Health Department v. Purdon*, 99 N. Y. 237, 1 N. E. Rep. 687; *Jeffers v. Jeffers*, 107 N. Y. 650, 14 N. E. Rep. 316; *Genet v. D. & H. Canal Co.*, 122 N. Y. 505, 25 N. E. Rep. 922; *Thomas v. Protective Union*, 121 N. Y. 45, 24 N. E. Rep. 24; *MacLaury v. Hart*, 121 N. Y. 636, 24 N. E. Rep. 1013. The injunction is so dependent upon the damages that the general term could not with propriety reverse the judgment as to damages and permit it to stand as to the injunction." In the Doyle case it was said: "While the action assumes an equitable form, and is sustained upon equitable principles, it is impossible to lose sight of the fact that its main purpose and object is the recovery of the damages to plaintiff's property. . . . And the proof of damages was an indispensable element of the plaintiff's case, as it cannot be supposed that a court of equity would entertain jurisdiction to restrain a trespass that was not shown to have produced any damage or loss to the plaintiff." As, in this case, there was no proof or finding that the plaintiffs suffered any substantial damage, the doctrine of the cases cited amply justifies the conclusion that the question whether the court would grant or withhold relief by injunction was discretionary with the trial court. The judgment should be affirmed, with costs.

All concur; ANDREWS, C. J., in result. Judgment affirmed.

**Light and Air—Deeds—Building Restriction—Covenant
Running with the Land—Injunction.**

LANDELL ET AL. v. HAMILTON ET AL.

(Supreme Court of Pennsylvania. May 4, 1896.)

(175 Pa. 327 ; 34 Atl. Rep. 663.)

In equity, the test by which to determine whether a covenant in a deed runs with the land is the intention of the parties ; to ascertain such intention, resort must be had to the words of the covenant read in the light of the surroundings of the parties and the subject of the grant.

Where a building restriction is still of substantial value to a dominant lot, notwithstanding the changed use of the land and buildings, equity will restrain its violation if relief is properly sought.

An easement of light and air may be implied from a building restriction in a deed.

In 1831 H. was the owner of three adjoining lots of ground on the south side of Chestnut street near Twelfth, in the city of Philadelphia. All of the lots extended to Sansom street. In that year the neighborhood was confined to residences. It is now exclusively given up to business. On each of the two outer lots H. built a three and one-half story brick house, covering the entire front, the main buildings extending back fifty-one feet, then back buildings for dining-room and kitchen two stories high extending sixty-six feet further back, five feet six inches narrower than the main building, leaving that width between the walls of the buildings and the lines of the middle lot. He also built a house on the middle lot, the main building being the same as the other two, with no back building, the kitchen being in the basement, the windows looking south towards Sansom street. In 1832 H. conveyed both the eastern and western lots for the consideration of \$19,000 for each lot, with the condition, "That no building or part of a building, other than steps and railings, cellar doors, door frames, window shutters, eaves and cornices, shall hereafter be built or erected on the said hereby granted lot of ground within five feet of the south line of the said Chestnut street. And the said H., for himself, his heirs, executors, administrators and assigns, doth hereby covenant, promise and agree to and with the said grantee, his heirs and assigns, that the house on the lot of ground adjoining to the west of the hereby granted lot, now belonging to the said H. shall be forever restricted from having any building or part of a build-

ing attached to the said messuage thereon erected of a greater height than ten feet from the surface of the yard." Later in the same year, H. conveyed the middle lot for the consideration of \$16,000, "under the condition, nevertheless, that no building, other than steps and railings, cellar doors and door frames, window shutters, eaves and cornices, shall hereafter be built or erected on the said hereby granted lot of ground within five feet of the south line of the said Chestnut street; and subject to the condition that the house on the lot of ground hereby granted is and shall be forever restricted from having any building or part of a building attached to the said messuage now erected thereon of greater height than ten feet from the surface of the yard." In the warranty clause it was declared it was "under the condition and subject as aforesaid." In 1895 defendants acquired title to the middle lot, and proposed to erect thereon a building one hundred feet high extending from Chestnut street to Sansom street. The plaintiffs, the owners of the adjoining lots, filed a bill to restrain them. *Held*, that in view of the surroundings of the parties at the date of the conveyance by H., the subject of the contract, the purpose of it and the words of it, it was intended to place a restriction upon the middle lot running with the land for the benefit of the outer lots, which should forever prevent the obstruction of light and air by buildings higher than ten feet to the rear of the main building. *Columbia College v. Thacher*, 87 N. Y. 311; *Page v. Murray*, 46 N. J. Eq. Rep. 325; *Jewell v. Lee*, 96 Mass. 145, distinguished.

Appeal from C. P. No. 2, Philadelphia county. Reversed.

Bill in equity for an injunction, to restrain the erection of a building on an alleged servient lot.

The facts appear by the opinion of the Supreme Court.

The court refused an injunction.

Error assigned was decree refusing injunction.

Henry K. Fox, Charles C. Lister with him, for appellants. —Any words indicating the intention of the parties create a covenant running with the land: *Paschall v. Passmore*, 15 Pa. 295, 307; *Cromwel's Case*, 2 Coke, 71a; *Hartung v. Witte*, 59 Wis. 285; *Batley v. Foerderer*, 162 Pa. 460.

While at common law it would be necessary to make an inquiry as to the relative difference between a condition and a covenant, yet equity goes directly to its substantial elements and inquires what duty does it assure, and to whom? *Clark v. Martin*, 49 Pa. 297.

Equity will give effect to the intention and spirit of the restriction by restraining any impairment of the light and air: *Muzzarelli v. Hulshizer*, 163 Pa. 643; *Ivory v. Burns*, 56 Pa. 300; *St. Andrew's Church's Appeal*, 67 Pa. 512; *Bald Eagle Valley R. R. Co. v. Nittany Valley R. R. Co.*, 171 Pa. 284; *Wray v. Lemon*, 81* Pa. 273; *Philips's Appeal*, 93 Pa. 45, 50.

The restriction in *Orne v. Fridenberg*, 143 Pa. 487, 502, while not expressing in terms its purpose, was for light and air. This purpose was found by the master, and was admitted in the argument of the appellants. The case, however, did not turn on this point, but expressly on the question of laches: *Groff v. Turnpike Co.*, 144 Pa. 150.

The deed of the party to be bound must be taken most strongly against him: *Beeson v. Patterson*, 36 Pa. 24; *Miner's Appeal*, 61 Pa. 283; *Klaer v. Ridgway*, 86 Pa. 529.

Keates v. Lyon, 4 L. R. Ch. 218, lacked the element of mutual covenants, and therefore the motion was refused.

Peek v. Matthews, 3 L. R. Eq. 515, is no more an authority for defendants' position than is *Orne v. Fridenberg*, for, in the former case, the breaches of covenant on the general plan of improvements had taken place, as to other properties than that included in the bill, a long time previously, and the court held that the covenantee under such circumstances could not enforce his covenant against a new purchaser, for it could only be partly performed.

Roper v. Williams, *Turner & Russell's Reports*, 18, resembled *Peck v. Matthews* and our own case of *Orne v. Fridenberg*, in that, having slept on its rights and permitted violations of the covenant, the plaintiff's action in equity should be and was dismissed.

Duncan v. Railway Co., 85 Kentucky, 525, was where it was agreed that "no business, manufacturing or other than dwelling-houses" should be built upon the lot, and no building should front except in a particular way. After the sale of the particular lot the plan was abandoned and

adjacent lots were sold without restriction, thus rendering it impossible for the appellant to carry out his plan, thus abandoned, and the injunction was refused.

In *Dana v. Wentworth*, 111 Mass. 291, GRAY, J., distinguished the plaintiff's case from that in which the covenant was for the benefit of the grantee or his assigns, and the case differed from the case in point in that the plaintiff could not show that she was the owner of any land which might be affected by a disregard of the restriction.

John G. Johnson, Julius C. Levi with him, for appellee. —It amounts to nothing to urge, as the appellants do, that the restriction has not been questioned for sixty-four years. The reason therefor is very apparent. It is admitted by the appellees that no building of greater height than ten feet could have been attached to the structure which was upon their lot at the time the restriction was imposed. As the old building has remained until the present time, the restriction, of course, continued to be operative. No building can be erected, under the appellees' interpretation of the restriction, so long as the old structure remains.

We submit, that the fact that the appellants have enjoyed for sixty-four years light and air by reason of the restriction, renders somewhat strange the argument of their counsel to the effect that under the appellees' interpretation no benefit could ensue to them. For sixty-four years, because of the fact that it was not deemed advantageous to destroy the old building, the appellants have enjoyed the light and air given to them by the original restriction. This, however, is no reason why they shall enjoy the benefit of what was never given *qua* a building now about to be erected.

The question is not what may have been in the minds of the parties, though the answer to this question, in our judgment, would be that they contemplated only that for which they provided, *i. e.*, an attachment to the old building. The real question is, What did they agree upon? What is the

ordinary and proper construction of the words which they used? Did they mean to restrict the use of more than three-fourths of a lot when they merely provided that there should be an attachment to a building which was then in existence?

The case of *National Provincial Plate Glass Insurance Company v. Prudential Assurance Company*, 6 Ch. D. 757, is interesting in that it shows that the English doctrine of ancient lights protects only the lights of a building theretofore erected, or of one practically substituted for the first. It does not protect the lights of a new building of a different character from the old.

It is not necessary for us to appeal to the doctrine that courts of equity will not enforce restrictions imposed by reason of a certain situation after such situation has changed. The inclination of the court would be to permit a valuable improvement to be made, not to prevent the same, even though the words were clear. In the absence, however, of clear words, and under a restriction merely against building an attachment to an old building, this court will hardly feel inclined to stand in the way of improvement and to destroy the value of the appellee's property.

DEAN, J.—In the year 1831, William Hause, being the owner of a lot of ground on the south side of Chestnut street, between Twelfth and Thirteenth streets, fronting on Chestnut seventy-four feet, and extending back to Sansom street two hundred and thirty-five feet, divided it into three lots, giving the middle and western lot, each, a frontage on Chestnut street of twenty-five feet, and the eastern one twenty-four feet on the same street, all extending back at right angles to Sansom street. On each of the two outer lots he built a three and a half story brick house, covering the entire front; these main buildings extending back fifty-one feet eleven inches; then, back buildings for dining-

room and kitchen, only two stories high, but extending sixty-six feet further back; these back buildings, however, were five feet six inches narrower than the main building, leaving that width between the walls and the lines of the middle lot. He also built a house on the middle lot, the main building being the same as the other two, but with no back building, the kitchen being in the basement, the windows looking south towards Sansom street.

On March 24, 1832, Hause conveyed both the eastern and western lots to Lindsay Nicholson and Rebecca H. Willing, for the consideration of \$19,000 for each lot. In the deeds was this condition:

“Under the condition, nevertheless, that no building or part of a building, other than steps and railings, cellar doors, door frames, window shutters, eaves and cornices, shall hereafter be built or erected on the said hereby granted lot of ground within five feet of the south line of the said Chestnut street. And the said William Hause, for himself, his heirs, executors, administrators and assigns, doth hereby covenant, promise and agree, to and with the said Lindsay Nicholson, his heirs and assigns, that the house on the lot of ground adjoining to the west of the hereby granted lot, now belonging to the said William Hause, shall be forever hereafter restricted from having any building or part of a building attached to the said messuage thereon erected of a greater height than ten feet from the surface of the yard.”

The numbers of these two lots are 1206 and 1210. The title to 1206, by regular conveyances, all duly recorded, and embodying the condition, became vested in plaintiff, and in 1888 that of 1210 became vested in George Allen for the consideration of \$125,000.

On November 10, 1832, Hause, for the consideration of \$16,000, conveyed the middle lot—1208—to one Stewart, under whom defendants claim. In that deed, after mentioning that the lot is bounded east by 1206 and west by 1210, is inserted the following condition:

“Under the condition, nevertheless, that no building, other than steps and railings, cellar doors and door frames, window shutters, eaves and cornices, shall hereafter be built or erected on the said hereby granted lot of ground within five feet of the south line of the said Chestnut street; and subject to the condition that the house on the lot of ground hereby granted is and shall be forever restricted from having any building or part of a building attached to the said messuage now erected thereon of a greater height than ten feet from the surface of the yard.”

In the warranty clause, it is declared it is, “Under the condition and subject as aforesaid.”

There seems to be no doubt that, in the intervening sixty-three years between 1832, the date of the first conveyance, and 1895, when defendants took their title, the owners and occupants of the middle lot had, in some particulars, failed to keep within the strict terms of their conveyance. Structures had been put upon the Sansom street end of the lot, higher than the limit prescribed in the deed; and some of the buildings on the lot in rear of the main building were of a height slightly in excess of the allowable ten feet from the surface; but no hostility to the right of plaintiff was intended, and there was no substantial interference with the light and air enjoyable by 1206 and 1210 from a practically unobstructed middle lot free from high buildings.

The defendants, the last purchasers of the middle lot, are about to take down the old house erected in 1832, with the view of putting upon it a building one hundred feet high, extending from Chestnut to Sansom, formerly George street. The plaintiffs file this bill to restrain them, alleging that such a structure will be a palpable violation of their right under the covenants in the prior deeds of their common grantor.

The defendants admitted the facts as we have stated them, but denied that the building they intended to put up was an illegal violation of the restriction. Further, they averred

the character of the locality had entirely changed since 1832, when the restriction was first imposed; at that time that part of Chestnut street was taken up by residences; now it is devoted to business.

The court below refused to enjoin defendants, and plaintiffs appeal.

We are of opinion, the issue turns wholly on the interpretation of the covenant in the deed of March 24, 1832, from Hause to Nicholson for lot 1206. The grantor covenants for himself, his heirs and assigns, with the grantee, his heirs and assigns, "that the house on the lot of ground adjoining to the west of the hereby granted lot, now belonging to the said William Hause, shall be forever hereafter restricted from having any building or part of a building attached to the said messuage, thereon erected, of a greater height than ten feet from the surface of the yard." Then the subsequent conveyance of the middle lot imposes on that grantee and his assigns subserviency to the restriction in favor of the grantees of the east and west lots.

Does the covenant run with the land? If so, the power of the owner of the land, out of which he carved three lots, to burden the middle one with such a continuing covenant, cannot be questioned. It has been decided, as will be noticed from the cases hereinafter cited, that in equity the test by which to determine whether a covenant in a deed runs with the land is the intention of the parties. To ascertain the intention resort must be had to the words of the covenant read in the light of the surroundings of the parties and the subject of the grant.

It is argued, in substance, that a covenant running with the land, so manifestly prejudicial to the enjoyment of the middle lot, could not have been intended by the grantor; that the reasonable construction is, the obligation under it terminates with the removal of the house then upon the middle lot.

That this covenant, if a perpetual burden, now most

vexatiously restricts the owner of 1208 in the enjoyment of the property, and very greatly depreciates its value, may be conceded; and if such result had appeared imminent at the date of the conveyance this argument would, perhaps, not have been without weight. It will be noticed that, notwithstanding the restriction, the consideration for the middle lot in 1832 was \$16,000, and for each of the others \$19,000; the owner seems to have received, in enhanced value of the two outside lots, by reason of the additional back buildings and the benefits accruing to them from the restriction in their favor on the middle one, \$6,000. He doubtless, at that day, assumed this sum represented the value of the relative advantages and disadvantages to the lots created by the restriction. But he did not foresee the comparatively near future any more than we see ours. In our bargains, to the extent we judge probable, we provide for and guard against proximate future contingencies; as to the very remote, or what appears to us the very remote, we are indifferent. The serious effect of the restriction, now, after the comparatively short period of sixty years, as affecting the enjoyment of the middle lot, even if his intention had been to hold it for himself and heirs, was not thought probable by him or any other lot-owner of that period. The present values of real estate in the present Philadelphia may have been thought possible in a couple of centuries, but not sooner. They knew the growth of the city in the preceding century and a half of its existence, and that it had then reached a population of less than two hundred thousand, but they had no reason to believe that in the next half century the population would reach more than a million, and that new methods of communication and travel would then have placed other millions practically as close to them as was Lancaster county then. They bargained on a knowledge of their future no more limited than ours as to our future, only much more limited than ours of theirs, because we are looking backward. Not one of us would

hesitate to place a perpetual burden on land we expected to hold, in favor of land we wanted to sell, if thereby a present decided pecuniary benefit resulted, and no serious depreciation was probable in that held, for a century or two. To us, with no laws of entail, and no particular passion for perpetuating family landed estates in city lots, that period suggests to the mind a practical "forever," and so it probably appeared to Hause, when he burdened what he kept to enhance the price of what he sold. It was not an absurdly bad bargain, tending to negative the intention of a continuing covenant, but was merely such an ignorance of a phenomenal future as exists where men of good business capacity sell land one year which enhances in value, in some instances the next year, one or two hundred per cent. Of course, they would not have sold if they had known, or had reason to believe, such appreciation probable, and Hause would not have placed the restriction on the middle lot if he had thought it probable that without it the lot would appreciate in value an average of twenty per cent. annually, besides yielding the interest on his original investment. Considering the surroundings, we see nothing in the historical fact of the growth in value and change of use of unencumbered lots to negative the intention of the grantor, as indicated by his words.

And this intention is only the more clear when we consider the subject of the contract. He had built the three houses with a view to such a restriction; by the character of the structures, he intended the middle lot should be servient to the other two; for the depth of the main buildings they should be equal, but, from these back, the east and west lots should be dominant. The middle shall have no building higher than ten feet erected upon it; for this one he provides a basement kitchen, so that the lot is unobstructed for all three main buildings to the rear. What was the purpose in having the lot thus unobstructed? Manifestly that, as thus arranged by him, all three should

enjoy light and air. He then conveys the two outer lots with an expressed intention conforming to the structures; these last measured the extent to which the dominant lots should "forever" enjoy light and air, but at the same time did not exclude the occupant of the main building on the middle one from a like benefit; the latter's right to the enjoyment of the surface of his lot, for building purposes, is alone restricted. The parties were not dealing about houses as houses, but concerning the future enjoyment of land, with light and air, as affected by the plans and size of houses or buildings which were then or might be thereafter erected upon it. The word used, "forever," is not one appropriate to the limited existence of a house or other building, but to the durability of land. The expression, if intended only to restrict while the then house stood, is scarcely less awkward than if, intending to restrict only during the life of the first grantee, the grantor had said, "And during the life of the said Lindsay Nicholson, the said Hause and his assigns shall be forever hereafter restricted." A word is used emphatically expressive of a continuance beyond the duration of a life or the existence of an artificial structure, which, if simply omitted, would have indicated the intent claimed by appellees.

The purpose to afford air and light to the dominant lots could only be accomplished by an unlimited, as to time, restriction; and there is nothing to indicate that a change in the nature of the occupancy should affect the expressed right under the covenant. It is probable that deprivation of air is less endurable to the occupants of a dwelling than to those of a store or factory; and generally the latter are less disposed to resist such deprivation; but these elements promote the health and comfort of one class of occupants as fully as the other, and both have the same right to insist on a restriction for their protection. No such change in the use of the land as appears here has ever been held destructive of the original covenant in any of the adjudi-

cated cases in this state; nor, in our opinion, can such judgment be sustained on sound legal principles.

Taking the surroundings of the parties at the date of the conveyance, the subject of the contract, the purpose of it and the words of it, we are of the opinion, it was intended to place a restriction upon the middle lot, running with the land, for the benefit of the eastern lot, which should forever prevent the obstruction of light and air by buildings higher than ten feet to the rear of the main building.

As long as such restrictions are not unlawful, it is to no purpose to argue that they seriously retard the improvement of the city. We can no more strike down by decree a lawful restriction creating an easement than we can compel the lot-owner to erect buildings in accord with the best style of architecture. Contracts such as this, whether construed as covenants or conditions, since *Spencer's case*, have been enforced, both at law and in equity, between the immediate parties to them and their grantees, near and remote. And whether they be personal to the grantor, or be limited to a period less than "forever," depends on the intention of the parties, as expressed in the written instrument: *Clark v. Martin*, 49 Pa. 289, 297; *Muzzarelli v. Hulshizer*, 163 Pa. 643; *Bald Eagle Valley R. R. Co. v. Nittany Valley R. R. Co.*, 171 Pa. 284.

We concede, some of the cases decided in other states are in apparent conflict with our decision. But what this court has uniformly held, and now holds, is, that where the restriction, notwithstanding the change of use of the land and buildings, still is of substantial value to the dominant lot, equity will restrain its violation, if relief, as here, is promptly sought. There may be and doubtless will occur cases where the restriction has ceased to be of any advantage. In such cases equity would not interpose and retard improvements simply to sustain the literal observance of a condition or covenant. And three of the cases relied on by appellees are of this very character, and therefore clearly

distinguishable from the one before us. In *Trustees of Columbia College v. Thacher*, 87 N. Y. 311, the agreement was between owners of dwelling-houses, that one of them would not erect, carry on or establish any stable, school-house, engine house, community house, or any kind of a manufactory, trade or business whatsoever on the land. His grantees opened up and carried on many kinds of business in violation of the original covenant. The purpose of the covenant was, manifestly, to secure privacy and freedom from noise in the dwelling-houses. But by the construction of an elevated railroad its desirability for dwellings had been practically destroyed; privacy and quiet could no longer be enjoyed; the court refused to enjoin the use of the land for business and manufacturing purposes, because, by the change consequent upon the construction and operation of the railroad, the purpose of the restriction had been defeated. Equity would not lend its aid to the enforcement of a mere legal right, where no damage resulted to plaintiff from non-enforcement.

In *Page v. Murray*, 46 N. J. Eq. 325, the restriction was to protect the land from cheap tenement buildings, and encourage its occupation by a superior class of residents. To this end it provided that, for a period of twenty years, no building should be erected costing less than \$3,000, and no hotel, tavern, lager beer saloon, livery stable, etc., should be erected thereon. In the meantime buildings of a low class had been erected in all the surrounding neighborhood. The purpose to make the land desirable for another class of occupants was thereby defeated, and this, together with the fact that the twenty years' term had nearly expired, induced the court to refuse an injunction to restrain violation of the condition. The court would not enjoin that which could not damage the plaintiff.

In *Jewell v. Lee*, 96 Mass. 145, there was a condition in the grant, that the land bordering on the ocean should be used for no other purpose than access to the water for bath-

ing and boating and low bath houses. It was held, from the facts in that case, that the intention of the grantor was to create a restriction in favor of adjoining land which he continued to hold; that, as this land had passed to other grantees in separate lots, they could not insist on a restriction personal to the original grantor, and the court says: "Where it is apparent the condition was annexed to a grant for the purpose of improving or rendering more beneficial and advantageous the occupation of the estate granted, when it should become divided into separate parcels, and be owned by different individuals, or when the manifest object of the restriction on the use of an estate was to benefit another tract adjoining to or in the vicinity of the land on which the restriction is imposed," equitable relief will be afforded.

Not one of these cases is in conflict with our decision here; on the contrary, they support it. While cases are cited which support the contention of appellee, the weight of authority is the other way, and we see nothing to induce us to depart from the settled rulings on this question, as announced in our own cases already cited.

The decree of the court below refusing an injunction is reversed, and an injunction is awarded as prayed for in plaintiff's bill. It is further ordered that appellees pay the costs.

Light and Air—Deeds—Building Restrictions—Covenant Running with the Land—Injunction.

ALLEN v. HAMILTON ET AL.

(Supreme Court of Pennsylvania. May 4, 1896.)

(175 Pa. 339 ; 34 Atl. Rep. 667.)

A deed contained a covenant by the grantor that a house belonging to him on a lot adjoining the lot conveyed should be " forever hereafter restricted from having any building or part of a building attached to the said messuage now thereon erected of a greater height than ten feet from the surface of the yard." *Held*, (1) that the word " now " as applied to the building only measured the exact quantity of ground unrestricted, as well as the quantity which was burdened with the restriction ; (2) that following the decision in *Landell v. Hamilton, supra*, the covenant should be enforced in equity.

Appeal from C. P. No. 2, Philadelphia county. Reversed.
Bill in equity for an injunction to restrain the erection of a building.

The facts appear by the report of *Landell v. Hamilton, supra*, p. 602, and by the opinion of the Supreme Court.

Error assigned was in refusing injunction.

George Junkin, H. S. P. Nichols and Joseph DeF. Junkin with him, for appellant.

John G. Johnson, Julius C. Levi with him, for appellees.

DEAN, J.—The facts in this case are substantially the same as in *Edwin A. Landell and others against the same defendants*, page 327, argued same day and opinion herewith handed down. This bill is by the owner of 1210, being the western one of the three lots, and was conveyed by the original grantor to Rebecca H. Willing on May 24, 1832, eight months before he conveyed the middle lot to Stewart. There is a slight difference in the words of the

covenant. The deed for 1206 stipulates that Hause and his assigns shall be forever hereafter restricted as to the middle lot from having any building attached to the messuage erected thereon; in the deed to the first grantee of this lot, 1210, the words, are, "The said messuage *now* erected thereon." The original deeds have been lost; the word "now" may have been inadvertently dropped from the other. We do not think its presence in this deed in any degree negatives the manifest intention of the grantor as adjudged by us in Landell's case. That intention was to restrict forever the owner of the middle lot from building on it higher than ten feet from the surface, from the main building to Sansom street, and the word "now," as applied to the building, only measures the exact quantity of ground unrestricted, as well as the quantity which is burdened with the restriction.

The evidence adduced to show a violation of the restriction hostile to the claim of the adjoining lots is in substance the same as in the other case. Some buildings were erected slightly higher than ten feet, but the owners of the middle lot, as well as of this one, believed they did not exceed that height. There is no testimony which in its strongest aspect would bar plaintiff's right to protect his light and air, because there never was an assertion of right hostile to the restriction.

It is doubtless true, as argued by appellees, that words might have been used in this covenant which would more aptly have expressed the intention to create a covenant running with the land; but in view of the surroundings of the parties, the subject of the contract, and its purpose, the intention to create such covenant by this language is manifest. For the reasons given in Landell's case the judgment here is reversed, and an injunction is directed to issue as prayed for in the bill; costs to be paid by appellees.

Light and Air—Deeds—Building Restriction—Injunction—Party Wall.

LANDELL ET AL. v. HAMILTON ET AL.

(Supreme Court of Pennsylvania. July 15, 1896.)

(177 Pa. 23; 35 Atl. Rep. 242. Modifying 175 Pa. 327; 34 Atl. Rep. 663; *supra*, p. 602.)

When a lot enjoys the privilege of light and air from a second lot, under a building restriction in a deed, and the owner of the first lot erects a solid division wall, cutting himself off from light and air, and maintains such a wall for a long period of years, he cannot enjoin the owner of the second lot from erecting a building to the height of that wall.

When the middle one of three lots in a row owes a servitude of light and air to each of the adjoining lots, under a building restriction in a deed, the owner of one of the adjoining lots cannot, by his independent act or deed, relinquish that servitude so as to affect the other.

The middle one of three lots in a row owed a servitude of light and air to the adjoining lots under a building restriction in a deed which prevented the owner of the middle lot from building higher than ten feet from the ground. The owner of one of the adjoining lots built a solid division wall higher than ten feet from the ground. The owner of the other adjoining lot built a similar wall higher than ten feet from the ground, but of a less height than the other wall. Both walls were maintained for many years. *Held*, that the owner of the middle lot should not be enjoined from building to a height equal to the height of the lower of the two division walls.

Appeal from C. P. No. 2, Philadelphia county. Decree modified.

Petition on the part of appellees for reargument.

The facts appear in *Landell v. Hamilton*, 175 Pa. 327; *supra*, p. 602.

John G. Johnson, with him *Julius C. Levi*, for petitioners.
Henry K. Fox, with him *Charles C. Lister*, for respondents.

DEAN, J.—At the first hearing in this case, both in oral argument and on the paper-books, the case turned on but a single question, viz., whether the restriction as to building placed by the original grantor on lot No. 1208, in favor of lots 1206 and 1210, was perpetual, or whether it ended with the existence of the house then upon the middle lot. After a careful consideration, we decided the restriction was continuing, and directed that an injunction issue in conformity to the prayer of the petitioner. The effect of this was to restrain defendants from putting any building on 1208 to the rear of the house upon it in 1832 higher than ten feet from the surface of the lot.

The defendants then petitioned the court for a modification of the decree, for the reason, that even if the judgment of the court that the restriction was a continuing one were well founded, the plaintiffs, by their own acts, had relinquished the right to assert it to the full extent set out in Hause's deed of 1832. The case is fully reported: *Landell et al. v. Hamilton et al.*, 175 Pa. 327; *supra*, p. 602.

The court ordered a reargument only on the question as to whether the decree should be modified, and if so, to what extent. This reargument was heard on the 27th of May, 1896.

As will be noticed in the reported case, Landell's lot is 1206, the eastern one; the defendant's, 1208, the middle one; and Allen's, 1210, the western one. It now appears, on reargument, that as to Landell's lot, either he or his grantors, years prior to the filing of the bill to restrain defendants, had built a solid wall, seventeen feet high, from the rear of the old building on 1208 south towards Sansom street, a distance of not quite nineteen feet, and then continued the same kind of wall at the height of twelve feet, thirty-seven feet further. The defendant calls this a party wall; there is no evidence that it is such, or was so intended by the builder, except that it extends over the line of 1206 and rests partly on 1208. The character of the structure,

twelve feet in height for thirty-seven feet in length, and then seventeen feet high for about nineteen feet, rebuts the inference that it was ever intended as a party wall in the legal signification of that term, to be used by both lot-owners for building purposes. The most that can be said for it on the evidence is that it was a partition or division wall, the same as a partition fence dividing the two lots. It may have been a trespass on 1208 to the extent it rests on that lot; if so, the owner or owners submitted to it; but by their submission they acquired no right inconsistent with the restriction imposed upon the middle lot by the covenant in the deed. The right to a party wall is statutory. It is not a right to at any time and in any manner use the land of another. One of two adjoining owners, for building purposes, may, subject to limitations consistent with the right of each, encroach upon his neighbor with a party wall. But, manifestly, this was no such structure, and conferred on defendants no right to assume it absolutely terminated the restriction in favor of the Landell lot. For even if a party wall, at most it gave the middle lot-owner the right to use it as a party wall to the height of ten feet, the limit of the restriction.

But the wall was solid to the height and length it was built. The purpose of the restriction was to afford light and air to 1206, and the extent of the enjoyment was measured by the extent of the restriction on 1208. That restriction was, no building or part of a building should be added to the house upon the lot to the rear higher than ten feet from the surface of the lot. But Landell or his grantors themselves erect a solid wall along the line of 1206 and 1208, fifty-six feet in length from the rear of the old building on the middle lot, through which neither light nor air could penetrate. By their own act plaintiffs have said, for nineteen feet we do not ask for light and air, except at the height of seventeen feet, and for thirty-seven feet further we do not ask for either, except at the height of twelve feet.

Clearly equity will not compel defendants to award to plaintiffs that which by their own distinct and unequivocal act they have declared is valueless to them.

It is alleged now the ownership of plaintiff to 1206 does not extend to Sansom street, but only one hundred and forty-nine feet from Chestnut, leaving about eighty-six feet to which the injunction should not apply. To this it is replied, the bill alleges and the answer admits, plaintiffs, Landell *et al.*, own back to Sansom street, and there is no proof to the contrary. So far as we can discover from the pleadings and proofs the title of Landell *et al.*, or any part of it, is nowhere disputed; therefore we can make no modification of the decree in this particular.

The restriction here, by the covenants in the original deeds, renders it impossible to make such modification of the original decree as will preserve the apparent right of defendant as against each of these parties. The middle lot is servient to both the eastern and western; but the owner of neither the eastern nor western can, by his independent act or deed, relinquish that subserviency so as to affect the other. Here the owner of 1206 has declared that for nineteen feet light and air from 1208 are valueless to him below a height of seventeen feet, and for thirty-seven feet further they are valueless below twelve feet; thus, for a distance of fifty-six feet, waiving the strict terms of the restriction. The owner of 1210 has also waived the restriction by building his wall fifty-six feet to a height of thirteen feet nine inches. We cannot say, because the one waived the restriction for nineteen feet to the height of seventeen feet, therefore the other did so too; or because one waived it for thirty-seven feet to the height of thirteen feet nine inches, therefore the other is bound, when by his own act he only waived to a height of twelve feet for that distance. As we have said, neither could, by his independent act or deed, affect the right of the other. But it seems to us the correct conclusion is that, to the full extent they have

equally gone in dispensing with the restriction, both can in equity be made subject to our decree.

Therefore, we modify the original decree so that it shall not operate to restrain defendants from building to a height of thirteen feet nine inches, for a distance of nineteen feet from the rear of the old main building on the middle lot. Further, from the end of the nineteen feet thus specified it shall not operate to restrain the defendants from building to a height of twelve feet from the ground for a further distance of thirty-seven feet.

The costs of this case to be taxed as part of the original decree.

Light and Air—Deed—Building Restriction—Injunction—Party Wall.

ALLEN v. HAMILTON ET AL.

(Supreme Court of Pennsylvania. July 15, 1896.)

(177 Pa. 26 ; 35 Atl. Rep. 957. Modifying 175 Pa. 339 ; 34 Atl. Rep. 667 ; *supra*, p. 616.)

When a lot enjoys the privilege of light and air from a second lot, under a building restriction in a deed, and the owner of the first lot erects a solid division wall, cutting himself off from light and air, and maintains such a wall for a long period of years, he cannot enjoin the owner of the second lot from erecting a building to the height of such wall.

When under a building restriction the owner of a lot is not permitted to build higher than ten feet from the ground so as to afford light and air to the adjoining lot, a solid wall erected by the owner of the adjoining lot on the division line to the height of thirteen feet nine inches, and not intended by him as a party wall, is not a party wall in any sense of the word.

Appeal from C. P. No. 2, Philadelphia county. Decree modified.

Petition on the part of appellees for reargument.

The facts appear in *Allen v. Hamilton*, 175 Pa. 339; *supra*, p. 616.

John G. Johnson, with him *Julius C. Levi*, for petitioners.

George Junkin, for respondent, cited, on the question of party wall: *Vollmer's Appeal*, 61 Pa. 118; *Weigmann v. Jones*, 163 Pa. 330.

DEAN, J.—We have this day handed down, in the case of *Landell et al. versus* same defendants, a modification of our first decree, filed May 4, 1896, in that case. The same original decree was made in this case. See *Allen v. Hamilton et al.*, 175 Pa. 339, *supra*, p. 616. The application of the same principles as in the decision this day filed would induce a modification of the decree here. We do not think the structures of plaintiff along the lines of lots 1208 and 1210 are, in any sense of the word, a party wall; they were not intended as such by the owner of 1210, who erected them, nor had the owner of 1208 any reason to consider them as such; in the most favorable construction to defendants they had but the right to use the walls for building purposes to the height of ten feet, to which the restriction limited them. But it appears plaintiff or his grantors built a line or division solid wall along 1210, from the rear of the old main building on 1208, thirteen feet nine inches high, for a distance of fifty-six feet, and from that point back to Sansom street was built a still higher wall. That is, the owner of 1210 has by his acts declared that, on the whole, to a greater height than 1206 has conceded, light and air from 1208 are valueless to him; he has himself completely shut out more of both. But we can make no modification of the decree in favor of defendants which can affect 1206. The owner of 1210 can no more affect the right of the owner of 1206 by his act in building a wall than he could destroy that right by a deed relinquishing the restriction altogether.

We, therefore, only so far modify the original decree in this case as will make it accord with the modified decree in *Landell et al. versus* same defendants this day filed. While defendants, perhaps, do not get all they would have the right to demand as against Allen, they get all we can give consistent with the rights of *Landell et al.*

Let the original decree be modified so that appellees, *Hamilton et al.*, be restrained from building higher than thirteen feet nine inches for a distance of nineteen feet from old main building on 1208, and higher than twelve feet for a distance of thirty-seven feet further. Costs to follow original decree. Should the owner of 1210 agree to waive the restriction to the height of seventeen feet for a distance of nineteen feet, then there is nothing to hinder defendants from building to the height of seventeen feet on the whole lot for a distance of nineteen feet from the old main building, for, as we have seen in the decree in *Landell et al. v. Hamilton et al.*, the owner of lot 1206, as to that lot and to that extent, has already waived the restriction.

RIGHT TO THE ENJOYMENT OF LIGHT AND AIR.

1. **The Doctrine of Ancient Lights—In England.**—Although the right of the owner of a house to the enjoyment of light and air coming over the land of another does not seem to have been recognized in the early stages of the common law: *Bury v. Pope*, Cro. Eliz. 118; it was declared in *Darwin v. Upton*, 2 Saund. 175, c., that such a right could be gained by twenty years' prescription; and this case was generally followed, until the express enactment of the doctrine by § 3 of the Prescription Act of 2 & 3 Wm. 4, c. 71, put it beyond the possibility of question. It is therefore now the settled rule in England, that the owner of a tenement acquires by twenty years' prescription an indefeasible right to the enjoyment of the light and air that comes to his windows over the land of another, equivalent to an easement therein, and that in case of any material diminution

in the character or quality thereof he can either recover damages, or have an injunction to restrain the violation of his right; and that, as the statute merely substitutes a statutory title for the implied grant on which prescription rests, he may base his action either upon the statute or the broad ground of prescription: *Younge v. Shaper*, 27 L. T. N. S. 643; *Robinson v. Grave*, 29 L. T. N. S. 7; *Flight v. Thomas*, 8 Cl. & F. 231; *Tapling v. Jones*, 11 H. L. Cas. 290; *Simper v. Foley*, 2 J. & H. 555; *Maguire v. Grattan*, 2 Ir. R. Eq. 246; *Lanfranchi v. Mackenzie*, 4 L. R. Eq. 421; *Ladyman v. Grave*, 6 L. R. Ch. 763; *Kelk v. Pearson*, 6 L. R. Ch. 809; *Mackey v. Scottish Widows' Fund Life Assur. Society*, 11 Ir. R. Eq. 541; *Clark v. School Board for London*, 9 L. R. Ch. 120; *City of London Brewery Co. v. Tennant*, 9 L. R. Ch. 212; *Aynsley v. Glover*, 10 L. R. Ch. 283; *Hall v. Lichfield Brewery Co.*, 49 L. J. Ch. 655; *Seddon v. Bolton*, 19 Ch. D. 462; *Mitchell v. Cantrill*, 37 Ch. D. 56; *Robson v. Edwards*, [1893] 2 Ch. 146; *Martin v. Price*, [1894] 1 Ch. 276; *Jenks v. Viscount Clifden*, [1897] 1 Ch. 694. The injury is a continuing one; and the action therefor will survive, as an action for "injury committed in respect of property," under the second section of the Act of 3 & 4 Wm. 4, c. 42: *Jones v. Simes*, 43 Ch. D. 607; *Jenks v. Viscount Clifden*, [1897] 1 Ch. 694. The period of prescription begins to run when the exterior walls of the building, with the spaces for the windows, are completed, and the building is properly roofed in, although the window sashes and the glass may not be put in and the interior may not be finished until some time afterwards: *Courtauld v. Legh*, 4 L. R. Exch. 126; *Collis v. Laughner*, [1894] 3 Ch. 659. If the lights are not ancient, or have not been enjoyed for twenty years, there is no right to light and air through them; for there can be no prescription for light and air over open land: *Potts v. Smith*, 6 L. R. Eq. 311. A right to obstruct light may be reserved in a lease or other conveyance, and will pass to a subsequent purchaser of the land: *Mitchell v. Cant-rill*, 37 Ch. D. 56; *Haynes v. King*, [1893] 3 Ch. 439. Further, there is no reservation of an easement of light implied in favor of a grantor. The purchaser of a part of the premises may obstruct the ancient lights of the grantor's house: *Curriers' Co. v. Corbett*, 2 Dr. & Sm. 355; *Keats v. Hugo*, 115 Mass. 204;

Doyle v. Lord, 64 N. Y. 432; and the first purchaser may obstruct the lights of a subsequent one: Robinson v. Grave, 21 W. R. 223; Wheeldon v. Burrows, 12 Ch. D. 31. When land is taken under the exercise of the right of eminent domain, and structures erected thereon which obstruct the light and air, the only remedy is by action for damages, whether the land taken is that of the plaintiff or another: Dunball v. Walters, 35 Beav. 565; Bedford v. Dawson, 20 L. R. Eq. 353; Myers v. Catterson, 43 Ch. D. 470; Emsley v. North Eastern Ry. Co., [1896] 1 Ch. 418.

2. When an Injunction will lie.—If the right of the plaintiff is clear, he is entitled to an injunction against the threatened erection of a building which will interfere with that right: Yates v. Jack, 1 L. R. Ch. 295; Scott v. Pape, 31 Ch. D. 554; Martin v. Price, [1894] 1 Ch. 276; see Holland v. Worley, 26 Ch. D. 578; if the light is obstructed by a building in course of erection, a mandatory injunction will issue to compel its removal; and such an injunction will be granted, though the building was completed before the writ issued, if it was applied for in time: Lawrence v. Horton, 59 L. J. Ch. 440; Smith v. Smith, 20 L. R. Eq. 500; Myers v. Catterson, 43 Ch. D. 470; Shiel v. Godfrey, [1893] W. N. 115. In Von Joel v. Hornsey, [1895] 2 Ch. 774, the defendant was erecting a building near the plaintiff's house, and the latter warned him that if the building were continued he would sue to restrain it as an obstruction of his ancient lights. After the action was brought the defendant evaded service of the writ for several days, and meantime continued the building until substituted service on him was effected. Under the circumstances, it was held that the plaintiff was entitled to an interlocutory mandatory injunction ordering the defendant to pull down so much of the building as had been erected after the plaintiff had warned the defendant that he intended to bring an action. But if the plaintiff stands by and allows the building to be completed before applying for the writ, it seems that it will be refused and he be put to an action for damages, unless the injury done him is irreparable: Senior v. Pawson, 3 L. R. Eq. 330; Stanley v. Shrewsbury, 19 L. R. Eq. 616; Mott v. Shoolbred, 20 L. R. Eq. 22. Further, in order to

ground an injunction, the plaintiff must show that the light and air will be permanently obstructed to such an extent as to render his house less comfortable than before, or so as to prevent him from carrying on his business as beneficially as he could before, or else that the market value of the premises is materially lessened; for an injunction will be granted only in case of material injury: *Jackson v. Newcastle*, 3 De G., J. & S. 275; *Clarke v. Clark*, 1 L. R. Ch. 16; *Robson v. Whittingham*, 1 L. R. Ch. 442; *Dent v. Auction Mart Co.*, 2 L. R. Eq. 238; *Kino v. Rudkin*, 6 Ch. D. 160; and therefore, if damages could not be recovered at law, there is no basis for granting an injunction: *Leech v. Schweder*, 9 L. R. Ch. 463.

3. Alteration of Ancient Lights.—The doctrine only extends to ancient lights in their original condition at the time the prescription ran; and if such lights are altered by the owner thereof, the owner of the servient tenement may then obstruct them: *Cotching v. Bassett*, 32 Beav. 101; *Heath v. Bucknall*, 8 L. R. Eq. 1; *National Provincial Plate Glass Ins. Co. v. Prudential Assur. Co.*, 6 Ch. D. 757; especially if the building is pulled down and rebuilt: *Fowlers v. Walker*, 51 L. J. Ch. 443; and if some only of the lights are altered, but the new lights cannot be obstructed without darkening the ancient ones, the plaintiff will not be granted an injunction: *Davies v. Marshall*, 1 Dr. & Sm. 557; *Weatherly v. Ross*, 32 L. J. Ch. 128; s. c., 1 H. & M. 349. It has been held, however, that if the owners of the dominant tenement will block up his new or altered lights, and restore the ancient ones to their former condition, the owner of the servient tenement will be enjoined from obstructing them: *Cooper v. Hubbuck*, 30 Beav. 160; *Weatherly v. Ross*, 32 L. J. Ch. 128; s. c., 1 H. & M. 349. Further, it would seem reasonable to hold, that if the lights have been altered at any time more than twenty years past, although since the original prescription attached, a new prescription will run in respect of them.

4. The Doctrine of Ancient Lights—In America.—The English doctrine of ancient lights, as has been said, seems not to have formed part of the common law, prior to the decision of *Darwin v.*

Upton, 2 Saund. 175, c., in 1786 ; and as the American colonies were then independent, this doctrine formed no part of the common law as received by them. Accordingly, in most of the United States it is held that an easement of light and air cannot be acquired by prescription ; and an interference therewith will consequently not be enjoined. This rule prevails in Alabama : Ray v. Lynes, 10 Ala. 63 ; Ward v. Neal, 37 Ala. 500 ; California : Western Granite & Marble Co. v. Knickerbocker, 103 Cal. 111 ; Connecticut : Ingraham v. Hutchinson, 2 Conn. 584 ; Goodwin v. Hamersley, (Conn.) 36 Atl. Rep. 1065 ; Delaware : Hulley v. Security Trust Co., 5 Del. Ch. 578, disapproving the dictum in Clawson v. Primrose, 4 Del. Ch. 643 ; Georgia : Turner v. Thompson, 58 Ga. 268 ; Indiana : Keiper v. Klein, 51 Ind. 316 ; Stein v. Hauck, 56 Ind. 65 ; Iowa : Morrison v. Marquardt, 24 Iowa, 35 ; Kentucky : Ray v. Sweeney, 14 Bush, (Ky.) 1, overruling, *pro tanto*, Manier v. Myers, 4 B. Mon. (Ky.) 514 ; Louisiana : Oldstein v. Firemen's Building Assn., 44 La. An. 492 ; see, *contra*, Taylor v. Boulware, 35 La. An. 469 ; Maine : Pierre v. Fernald, 26 Me. 436 ; Maryland : Cherry v. Stein, 11 Md. 1 ; Massachusetts : Rogers v. Sawin, 10 Gray, (Mass.) 376 ; Carrig v. Dee, 14 Gray, (Mass.) 583 ; Richardson v. Pond, 15 Gray, (Mass.) 387 ; Randall v. Sanderson, 111 Mass. 114 ; Keats v. Hugo, 115 Mass. 204 ; *contra*, Story v. Odin, 12 Mass. 157 ; U. S. v. Appleton, 1 Sumn. (U. S.) 492 ; New Jersey : King v. Miller, 8 N. J. Eq. 559 ; Hayden v. Dutcher, 31 N. J. Eq. 217, overruling Robeson v. Pittenger, 2 N. J. Eq. 57 ; New York : Parker v. Foote, 19 Wend. (N. Y.) 309 ; Myers v. Gemmel, 10 Barb. (N. Y.) 537 ; Radcliff v. Mayor, 4 N. Y. 195 ; Shipman v. Beers, 2 Abb. N. C. (N. Y.) 435 ; Doyle v. Lord, 64 N. Y. 432, overruling Lampman v. Milks, 21 N. Y. 505 ; Knabe v. Levelle, 23 N. Y. Suppl. 818 ; Levy v. Samuel, 23 N. Y. Suppl. 825 ; North Carolina : Lindsey v. First Natl. Bk., 115 N. C. 553 ; Ohio : Hieatt v. Morris, 10 Ohio St. 523 ; Mullen v. Stricker, 19 Ohio St. 135 ; Pennsylvania : Hoy v. Sterrett, 2 Watts, (Pa.) 327, 331 ; McDonald v. Bromley, 6 Phila. (Pa.) 302 ; King v. Large, 7 Phila. (Pa.) 282 ; Hazlett v. Powell, 30 Pa. 293 ; South Carolina : Napier v. Bulwinkle, 5 Rich. (S. Car.) 311, overruling McCready v. Thomson, Dudley, (S. Car.) 131 ; Texas : Klein v. Gehrung, 25 Tex. (Sup.) 232 ; Vermont : Hubbard v. Town, 33 Vt. 295 ;

and West Virginia : *Powell v. Sims*, 5 W. Va. 1. In *Lindsey v. First Natl. Bk.*, 115 N. C. 553, where plaintiffs rented the second story of a building for a purpose which required unobstructed light, (taking photographs,) and subsequently the owner of the adjacent lot erected a building thereon, one wall of which stood on a strip in dispute between the adjacent owner and plaintiff's lessor, it was held that the plaintiffs could not recover damages, even if the title to the disputed strip was in their lessor. The only states in which the English rule seems now to be followed are Illinois : *Gerber v. Grabel*, 16 Ill. 217 ; and Virginia : *Berkeley v. Smith*, 27 Gratt. (Va.) 892 ; and in all probability these will also adopt the American doctrine whenever the question is squarely raised again. In view of the overwhelming mass of authority which supports it as well as the principles of common sense and justice on which it is based, they cannot well do otherwise. But it is only an erection wholly on the defendant's own land that is permitted ; an injunction will lie to restrain an adjoining property owner from maintaining a fence on the division line, so high that it shuts off the circulation of air from the plaintiff's dwelling, thereby rendering it damp and unhealthy : *Western Granite & Marble Co. v. Knickerbocker*, 103 Cal. 111 ; *Peck v. Roe*, (Mich.) 67 N. W. Rep. 1080 ; *contra*, *Triplett v. Jackson*, (Kans.) 48 Pac. Rep. 931 ; and *a fortiori*, one will be restrained from erecting such a fence or wall on the plaintiff's land : *Sankey v. St. Mary's Female Academy*, 8 Mont. 265. It has been suggested that there should be a distinction drawn in this regard between the city and the country, the enjoyment of light and air in the former being so much more necessary and so much more liable to be interfered with to the utter destruction of the plaintiff's property, than in the latter : *Morrison v. Marquardt*, 24 Iowa, 35 ; but the great weight of authority is against such a distinction : *Martin v. Headon*, 2 L. R. Eq. 425 ; *Keats v. Hugo*, 115 Mass. 204 ; *Myers v. Gemmel*, 10 Barb. (N. Y.) 537 ; *Doyle v. Lord*, 64 N. Y. 432 ; *Mullen v. Stricker*, 19 Ohio St. 135.

5. Motive.—As a general rule, the motive of the defendant in building on his own land will not be questioned. His right is absolute, and he can use it as he pleases. The nature of the

building, however, will sometimes be considered. Thus, though an injunction will not lie to compel the removal of a fence built on the defendant's land, which shuts off light from the plaintiff's dwelling, on the ground that it was erected from motives of pure malice: *Western Granite & Marble Co. v. Knickerbocker*, 103 Cal. 111; *Lapere v. Luckey*, 23 Kans. 534; *Triplett v. Jackson*, (Kans.) 48 Pac. Rep. 931; *Letts v. Kessler*, 54 Ohio St. 73, reversing 7 Ohio Cir. Ct. 108; *supra*, p. 579; it has been held that a fence erected maliciously, and with no other purpose than to shut out the light and air from a neighbor's windows, is a nuisance, and its removal may be ordered, though it is built on the defendant's own land: *Burke v. Smith*, 69 Mich. 380; *Flaherty v. Moran*, 81 Mich. 52; *Kirkwood v. Finegan*, 95 Mich. 543.

6. Grant of Easement of Light and Air.—An easement in light and air may be created by express grant: *Swansborough v. Coventry*, 9 Bingh. 305; *Keating v. Springer*, 146 Ill. 481; *Cooper v. Louanstein*, 37 N. J. Eq. 284; or by reservation in a grant: *Hagerty v. Lee*, 54 N. J. L. 580; and equity will relieve by injunction against any infringement thereof, whether damages could be recovered at law, or not: *Leech v. Schweder*, 9 L. R. Ch. 463. In *Morrison v. King*, 62 Ill. 30, the owner of premises had so constructed and arranged a large building of three stories, consisting of apartments, rooms and offices, devoted to different uses, that certain stairways furnished the only access to the upper stories. The stairways and halls were lighted by a skylight in the roof, and the building was thus used until his death. After that event, one end of the building, including one-half of the stairways, was assigned to the widow as her dower, and the rest, including the skylight, passed to devisees under the will. They then proposed to tear down their part of the building, and erect another four stories high in its stead, the effect of which would have been to destroy access to the second story of the widow's portion, destroy all access to the third story, and the lights, and render the rest of the building unsafe. On these facts, an injunction restraining them from so doing was held proper. In *Clement v. Putnam*, (Vt.) 35 Atl. Rep. 181, the owner of a lot, the level of which was below that

of the sidewalk, conveyed a portion of it to the plaintiff, covenanting in his deed never to build any "structure or building" on the adjacent premises within four feet of the west line, and afterwards conveyed the balance of the lot to the defendants, subject to the restrictions in the deed to the plaintiff. The defendants subsequently erected a building on their lot, not within four feet of the plaintiff's west line, and then claimed the right to fill the four-foot strip up to the level of the sidewalk with earth, so as to protect their wall, claiming that this action was not the erection of a structure or building within the restriction. The plaintiff sued for an injunction, which was granted, on the ground that he had a right, under the deed, to have the space kept vacant for the free passage of light and air to his basement.

7. Implied Grants.—As a general rule, an easement of light and air will not be presumed from a grant or lease of a tenement, without express mention thereof: *Warner v. M'Bryde*, 36 L. T. N. S. 360; *Potts v. Smith*, 6 L. R. Eq. 311; *Booth v. Alcock*, 8 L. R. Ch. 663; *Myers v. Gemmel*, 10 Barb. (N. Y.) 537; *Hubbard v. Town*, 33 Vt. 295; and the vendor may thereafter erect a building on his own land adjacent, and darken or even close up the windows of the house, unless the use thereof is destroyed by his action: *Kay v. Stallman*, 2 W. N. C. (Pa.) 643; *Donnelly v. Krosskop*, 19 W. N. C. (Pa.) 558; *Rennyson's Appeal*, 94 Pa. 147; but by the English Conveyancing and Law of Property Act, 1881, § 6, sub-s. 2, the conveyance of a house now includes all lights enjoyed with it: *Broomfield v. Williams*, [1897] 1 Ch. 602; and where no such statutes exist, a grant of such an easement will be implied wherever it is reasonably necessary to the beneficial enjoyment of the premises conveyed; for the grantor cannot derogate from his grant: *Palmer v. Fletcher*, 1 Lev. 122; *Tenant v. Goldwin*, 2 Id. Raym. 1089; *U. S. v. Appleton*, 1 Sumn. (U. S.) 492; *Janes v. Jenkins*, 34 Md. 1; *Hays v. Askew*, 7 Jones L. (N. C.) 272. Accordingly, if the grantor severs the title to a building on his land from the title to the adjoining property, and conveys it to another, an easement of light and air will become appurtenant to the building, if it is necessary for the purposes for which it was purchased: *Cox v. Matthews, Ventris*, 237; *Swansborough v. Cov-*

entry, 9 Bing. 305; *Wheeldon v. Burrows*, 12 Ch. D. 31; *Allen v. Taylor*, 16 Ch. D. 355; *Lavillebeuvre v. Cosgrove*, 13 La. An. 323; *White v. Bradley*, 66 Me. 254; and the same is true when the title to two parcels of land is severed, if the grantor retains the other lot until after a building is erected on the one sold: *Sutphen v. Therkelson*, 38 N. J. Eq. 318; though it has been suggested that if the grantee can open windows elsewhere in the house, which will serve his purposes equally well, he has no remedy by injunction: *Turner v. Thompson*, 58 Ga. 268. For example, when a building is leased for use as a dye-house, which requires a great deal of light, the lessor cannot afterwards obstruct the light by erecting another building on his premises: *Pages v. McLaren*, 7 N. J. L. J. 309; and when a light well or space for admitting light is made in a building, its obstruction may be enjoined: *Case v. Minot*, 158 Mass. 577. So, when a parcel of land held in common is severed into two tracts by quit-claim deeds simultaneously interchanged by the tenants in common, and there is a store on one of the two lots, with a window through which light and air are received across the open lot, that window cannot be closed by the owner of the latter lot if the influx of light and air is reasonably necessary to the beneficial enjoyment of the store: *Greer v. Van Meter*, 54 N. J. Eq. 270. But an easement of light and air will not be implied except when absolutely necessary to the beneficial enjoyment of the premises; and, as a general rule, a grant of a house in a town or city will not preclude the grantor from so building on his adjacent land as to darken or close the side windows of the house: *Wilmurt v. McGrane*, 45 N. Y. Suppl. 32. These rules apply to leases as well as to other grants: *Blunt v. McCormick*, 3 Denio, (N. Y.) 283; *Doyle v. Lord*, 64 N. Y. 432. If the lessor builds on his own land and thereby darkens the windows on one side of the house, so as to render them unfit for habitation or use, his action amounts to a constructive eviction from those rooms: *Royce v. Guggenheim*, 106 Mass. 201. And if those rooms are necessary to the proper enjoyment of the premises, it would seem that it amounts to an eviction from the whole house. It has been held that the implication extends only to ordinary purposes, and not to special purposes requiring an unusual amount of light: *Corbett v. Jonas*, [1892] 3 Ch.

137; *e. g.*, the business of a photographer: *Lindsey v. First Natl. Bk.*, 115 N. C. 553. But this distinction would seem to be opposed to the principle upon which the rule is founded, and to permit the very evil it was designed to prevent—permitting the grantor to derogate from his grant. The decision in *Pages v. McLaren*, 7 N. J. L. J. 309, cited above, page 632, would seem to be based on better grounds. The only exception that should be permitted is when a railroad company or other corporation, which has taken land under the right of eminent domain, and subsequently leased it, erects necessary structures on the land retained which darken the windows of the structure leased. In such a case it does not derogate from its grant, for the right to erect the structures necessary for its purposes is impliedly reserved in the lease, and the parties are presumed to contract with reference to it: *Myers v. Catterson*, 43 Ch. D. 470.

8. Subsequent Purchasers.—A subsequent purchaser or lessee of the vendor takes the premises subject to the easement, whether that be created by express grant or implied from necessity, if he be affected with notice thereof: *Davies v. Marshall*, 1 Dr. & Sm. 557; *Miles v. Tobin*, 16 W. R. 465; *Phillips v. Low*, [1892] 1 Ch. 47; *Ware v. Chew*, 43 N. J. Eq. 493. When the basement of a building is lighted from above by a floor light, the right to light from that source is an easement which passes with a lease of the basement, in the absence of a restriction in the lease, and the tenant of the room above will be enjoined from covering the light: *O'Neill v. Breese*, 23 N. Y. Suppl. 526. So, in *Janes v. Jenkins*, 34 Md. 1, where the lessor covenanted with the lessee of one lot, that he should make openings and place lights in a wall erected by the lessor, and the reversion of the lease was sold, with all its privileges, appurtenances and advantages, and another lot was sold by the lessor to a third person, it was held that the conveyance of the reversion of the lease passed the right to the free use and enjoyment of the light as then existing, as appurtenant to the land, and as against the vendee of the other lot. The mere fact of the existence of windows, however, is not necessarily notice of an implied grant: *Allen v. Seckham*, 11 Ch. D. 790; and in general no grant will be implied, as against a subsequent *bona fide* purchaser

of another portion of the grantor's land, unless the easement claimed "is so evidently necessary to the reasonable enjoyment of the granted premises, so continuous in its nature, so plain, visible and open, and so manifest from the situation and relation of the two tracts, as to fairly and clearly indicate to a prospective purchaser of the reserved portion, the intentions of the parties to the previous sale, that it should remain, and to make such purchaser chargeable with knowledge that the law, based on justice, that equity, founded on good conscience, would forbid him, in case of his purchase, so to occupy the lot as to interfere with such easement: *Robinson v. Clapp*, 65 Conn. 365.

9. Simultaneous Conveyances.—According to the English doctrine, when portions of the same premises are sold at the same time to different purchasers, and a house stands upon one parcel, the purchaser of the other cannot erect a building thereon so as to obstruct the lights of the house; and this rule applies, irrespective of the length of enjoyment, when there are buildings on both parcels: *Compton v. Richards*, 1 Price, 27; *Allen v. Taylor*, 16 Ch. D. 355. But in America, the purchaser of the unimproved parcel, or of the other house, will not take subject to an easement in favor of the other: *Shipman v. Beers*, 2 Abb. N. C. (N. Y.) 435; *Maynard v. Esher*, 17 Pa. 222, reversing 1 Phila. 22; *Haverstick v. Sipe*, 33 Pa. 368; unless it be necessary to the beneficial enjoyment of the latter: *Durel v. Boisblanc*, 1 La. An. 407; *Havens v. Klein*, 51 How. Pr. (N. Y.) 82.

10. Building Restrictions.—An easement of light and air may be, and often is, created by a clause in a deed commonly known as a building restriction, limiting erections on the premises conveyed to a certain height, or to a certain part of the premises. Thus, a covenant by the owner of a lot that he would not carry a wall separating his premises from those of the covenantees any higher than it then was, and, in case it "should be destroyed or injured or taken down, that no wall or anything else, to obstruct in the least degree the light or air, shall ever be there erected higher than ten feet from the surface of the yard," is the grant of an easement for light and air, and will be carried

into effect in accordance with the intention of the parties, by prohibiting the covenantor or his assigns from erecting any obstruction higher than ten feet, either on the ground occupied by the wall, or by the side of it : *Chase v. Walker*, (Mass.) 45 N. E. Rep. 916. But a condition that the grantor shall not erect any building more than one story high on an adjoining lot, so that the grantor "should not be incommoded in regard to light and air by any high building," does not confine the grantor to the precise height of a one-story building standing on the premises when the deed was executed ; and the condition is not violated by raising the height of that building by two feet, so as to make it uniform in height with the first floor of a building in front of it, giving him an increase of store room, rendered necessary by the growth of the town : *Hobson v. Cartwright*, 93 Ky. 368. An easement in light and air may also be created by implication by a building restriction, though light and air be not expressly mentioned as its object. Such a restriction will be construed as a covenant running with the land, and will be held to be perpetual, in spite of the fact that conditions have changed materially since the creation of the restriction ; and will be enforced by injunction : *Clark v. Martin*, 49 Pa. 289. Accordingly, a covenant that the grantee, his heirs and assigns, "shall not and will not, at any time or times hereafter, erect or put up, or cause or suffer to be erected or put up, any building or part of a building or other obstruction except a bath-house and privy and walls or fences not exceeding eight feet in height from the level of the ground," creates an easement of light and air in favor of the premises retained by the grantor : *Meigs v. Milligan*, 177 Pa. 66 ; see *Orne v. Fridenberg*, 143 Pa. 487. So, in *Muzarelli v. Hulshizer*, 163 Pa. 643, an owner of three adjoining lots executed three deeds on the same day for three lots to different persons. The deed for the middle lot contained the following clause : "It is further understood, conditioned and agreed by and between the said parties hereto that the said William C. Hough, his heirs and assigns, shall not nor will at any time hereafter erect or build on the said hereby granted lot any building or part of a building further westward than thirty-seven feet from the line of Ninth street, except a privy and bath-house not exceeding six feet in depth and sixteen feet in

height, from the lower floor of the house, now erecting on the said lot, to the eaves of said bath-house." The other two deeds did not refer to the building restriction, but they did recite the fact of the conveyance of the lot on the same day to the grantee mentioned in the deed. The neighborhood, at the time of the deed, was occupied by dwelling houses. At the time of the suit, it was used almost wholly for business purposes. But the supreme court held, reversing the court below, that the restriction was in the nature of a covenant running with the land, and was intended to and did create an easement of light and air in favor of the adjoining lots. Such a restriction will be strictly construed, however, and a lowering of the surface of land is not within the meaning of a deed by which one agrees "never to put or place any buildings, timber, trees or other nuisances on said land, and the same is always to remain open, with nothing to obstruct the view:" *Cross v. Frost*, 64 Vt. 179.

11. Conveyance of Alley or Passageway.—The extent of the implied right to the light and air coming through an alley, passageway or court, depends wholly on the terms of the grant. If that includes the whole alley or passageway, the whole must be left open for the passage of light and air, and the grantor or his successors in title cannot build over it: *Salisbury v. Andrews*, 128 Mass. 336; but unless the whole be included in the grant, the owner of the land over which a passageway has been granted or reserved may cover that passageway with a building, if he leaves a space so high, wide and light that the way is substantially as convenient as before for the purpose for which it was reserved: *Atkins v. Bordman*, 2 Metc. (Mass.) 457. In *Grafton v. Moir*, 130 N. Y. 465, affirming 1 N. Y. Suppl. 4, one of four lots was conveyed to the defendant, reserving "the right of way through and over" a carriage and alley-way, to stables on the other lots. One of those lots was subsequently conveyed to the plaintiff. The defendant built a brick building over the alley-way, which did not interfere with the plaintiff's ingress and egress, and left sufficient light for that purpose. Under these circumstances it was held that the reservation was not of the whole alley-way, but only of access over the same, with the light and air necessary therefor, and that he was not

entitled to claim that the alley-way should be left open to furnish light and air to his stable.

12. Eminent Domain—Compensation for taking of Light and Air.—Where, as in New York, the premises abutting on a street are assessed at its opening for the benefits of light, air and access, accruing therefrom, the levying and payment of the assessment give to the owners and their successors in title a right to the enjoyment of the light and air for which they have paid. This right cannot be taken from them for any private purpose; and one who erects any structure on the street for private purposes does so at his peril, and may be compelled to remove the same: *Wormser v. Brown*, 72 Hun, (N. Y.) 93, affirmed on another point, 149 N. Y. 163; *supra*, p. 590; and though such easements may be taken for public purposes, this can only be done upon payment of compensation. They may, therefore, be considered in estimating the damages suffered, though by themselves they have but a nominal value: *Story v. N. Y. El. R. R. Co.*, 90 N. Y. 122; *Mortimer v. N. Y. El. R. R. Co.*, 6 N. Y. Suppl. 898; *Mattlage v. N. Y. El. R. R. Co.*, 11 N. Y. Suppl. 482; *Galway v. Met. El. Ry. Co.*, 13 N. Y. Suppl. 47; *Krone v. Kings Co. El. R. R. Co.*, 50 Hun, (N. Y.) 431; *Peyser v. Met. El. Ry. Co.*, 13 Daly, (N. Y.) 122; *Scott v. Manhattan Ry. Co.*, 17 N. Y. Suppl. 364; *Stanley v. N. Y. El. R. R. Co.*, 17 N. Y. Suppl. 931; *American Bank Note Co. v. N. Y. El. R. R. Co.*, 129 N. Y. 252; *Bohm v. Met. El. R. R. Co.*, 129 N. Y. 576; *Cook v. N. Y. El. R. R. Co.*, 22 N. Y. Suppl. 790; *Gerber v. Met. El. R. R. Co.*, 23 N. Y. Suppl. 166; *Kearney v. Met. El. Ry. Co.*, 59 N. Y. Super. Ct. 563; *Lazarus v. Met. El. Ry. Co.*, 69 Hun, (N. Y.) 190; *Drucker v. Met. El. Ry. Co.*, 73 Hun, (N. Y.) 102; *Haddon v. Met. El. Ry. Co.*, 75 Hun, (N. Y.) 63; *Walsh v. Brooklyn El. R. R. Co.*, 76 Hun, (N. Y.) 24; *In re* Petition of Seaside & Brooklyn Bridge El. R. R. Co., 83 Hun, (N. Y.) 143; *Sperb v. Met. El. Ry. Co.*, 137 N. Y. 155, reversing 61 Hun, 539; *Bookman v. N. Y. El. R. R. Co.*, 137 N. Y. 302; *Saxton v. N. Y. El. R. R. Co.*, 139 N. Y. 320; *In re* Petition of Brooklyn El. R. R. Co., 6 App. Div. (N. Y.) 53; *McElroy v. Manhattan Ry. Co.*, 6 App. Div. (N. Y.) 367.

13. Right to Air Alone.—A right to the use of air alone, as an easement appurtenant to the tenement, may also sometimes be gained by prescription: *Hall v. Lichfield Brewery Co.*, 49 L. J. Ch. 655. In *Bass v. Gregory*, 25 Q. B. D. 481, the cellar of the plaintiff's public house was ventilated by means of a shaft cut therefrom through the rock into a disused well situated in an adjoining yard, owned and occupied by the defendant, the air from the cellar passing through the shaft and out at the top of the well. The cellar had been so ventilated for forty years at least, without interruption, and with the knowledge of the occupier of the yard; and it was held that the plaintiff could legally claim, as against the defendant, the easement of the free passage of air from the cellar, and that a lost grant of the right ought to be inferred. But in ordinary cases this right is either inseparable from the easement of light, or is appurtenant only to windows, so that it cannot be claimed in respect of a chimney: *Bryant v. Lefever*, 4 C. P. D. 172; or of a windmill: *Webb v. Bird*, 13 C. B. N. S. 841, affirming 10 C. B. N. S. 268. So, in *Chastey v. Ackland*, [1895] 2 Ch. 389, it was held that no right to the undefined passage of air could be acquired, either under the prescription act, by prescription at common law, or by the presumption of a lost grant; and, therefore, when the defendant, by building on his own land, intercepted the current of air that flowed laterally from the defendant's premises past the plaintiff's premises, which were more than twenty years old, and so caused the air in the plaintiff's yard to become more stagnant, it was held that the plaintiffs were not entitled to an injunction to compel the defendant to pull down his building. A right to air may be obtained by grant, however, express or implied, as in the case of light; and will be given equal protection: *Aldin v. Clark*, [1894] 2 Ch. 437.

Nuisance—Pollution of Water—Underdraining Cemetery into Sewer—Criminal Act—Injunction.

BARRETT ET AL. v. MT. GREENWOOD CEMETERY ASSOCIATION ET AL.

(Supreme Court of Illinois. January 20, 1896.)

(159 Ill. 385 ; 42 N. E. Rep. 891. Reversing 57 Ill. App. 401.)

The construction of a sewer by a cemetery association to underdrain ground used for burial purposes, and to discharge into a spring brook, will be enjoined at the suit of the owners of farm lands on the stream below, where it is shown that the effect would be to so pollute the water as to render it unfit for use either by human beings or stock.

The fact that the waters of a stream are contaminated to some extent by the natural and unavoidable drainage of surface water into it does not justify their deliberate pollution by the underdrainage of a cemetery therein for the purpose of improving the site as a burial place.

The fact that the pollution of a stream is a crime, by Cr. Code, § 221, does not deprive a court of equity of its power to enjoin the act, where its result would be irreparable injury to the persons or property of others.

Appeal from Appellate Court, First District.

Action in equity by George D. Barrett and others against the Mt. Greenwood Cemetery Association and others. A decree of the circuit court dismissing the bill was affirmed by the appellate court, (57 Ill. App. 401,) and plaintiffs appeal. Reversed.

Holden & Buzzell and *Whitehead & Stoker*, for appellants.
Runyan & Runyan, for appellees.

CARTER, J.—This was a bill in equity filed in the circuit court of Cook county by certain landowners, who are appellants here, to enjoin appellees, two cemetery corporations, from constructing a certain sewer so as to drain their ceme-

teries, and especially to underdrain certain wet and swampy portions thereof, used and to be used in burying the dead, into a running stream of water flowing through appellants' lands. The sewer empties into the brook where it crosses Morgan avenue, above appellants' lands, and is being constructed eastward along said avenue, between said cemeteries, with lateral extensions or spurs extending into the cemeteries for drainage, and especially designed to drain certain swampy portions thereof, as appear unfit for burial purposes unless underdrained. The sewer is being constructed under a contract between the two cemetery companies of the one part, and the commissioners of highways of the town of Worth, of the other part, whereby the former are to construct the sewer at their own expense, and to pay all damages to private property, and the town is to keep the same open and in repair for the use of the cemetery companies, and adjoining property owners are to have the right to connect. There is but little dispute as to the law of the case, the controversy relating chiefly to matters of fact. The testimony was taken by the master, to whom the cause was referred. Many witnesses were examined, and the evidence is too voluminous to be set out to any considerable extent here. The testimony shows, however, that said brook is a small, shallow stream, which rises north of Morgan avenue or One Hundred and Eleventh street, in the town of Worth, and flows southerly, fed by springs along its course, across said avenue, through the sixty acres of land owned by complainant George D. Barrett; thence south through a one hundred-acre tract owned by complainant W. B. Brayton, and across Raymond avenue, or One Hundred and Fifteenth street, and through land owned by complainant Saxon; and thence through an eighty-acre tract owned and occupied by complainant Ira S. Brayton, and eighty acres owned and occupied by Friederick Joehnke; thence across Lyon avenue, or One Hundred and Nineteenth street, over a forty-acre tract of land owned by complainants John

T. Dale and George D. Robinson. South of Morgan avenue, two and a half miles in a direct line, but four miles by the brook, complainant August Croever occupies a block of ground on which he has constructed ice houses, and where he conducts an ice business of \$5,000 or \$6,000 a year. The brook that runs through the lands of the other complainants, north of his premises, empties into Stoney creek, about three-fourths of a mile above his place. He has harvested ice from Stoney creek, and sold the same in Chicago and vicinity, for fourteen years past, for refrigerator and domestic purposes. The lands of the other complainants are used for pasturage and for farming purposes, and the water of the brook is used for stock, and, to some extent, is used in the homes of the occupants of the land, for domestic purposes. This brook running through said lands receives the washings from the streets, and from manured lands used for raising cabbages, adjoining it, north of the land of complainants; and in times of freshets the brook is muddy, but it is clear in its natural condition. Ditches have been constructed along Morgan avenue, and surface water coming south on Johnson avenue, which intersects Morgan avenue, is carried along the ditches into the brook. Dr. Bayard Holmes testified, as an expert bacteriologist, that bodies buried in boxes of wood would sooner or later be so liquefied as to be practically incorporated with the soil in which they were buried, and that the subterranean drainage of a cemetery draining into a sewer of brick and mortar, as ordinarily built, if drained into a spring brook, would carry contamination and pollute such a brook for five miles or more, and that brook, being dammed for ice-making within four miles from the cemetery, would result in a pond from which ice of a very pernicious quality would be harvested; that the water from a brook into which such sewerage drained would be unhealthy for cows and unfit for drinking purposes or for cooking water for domestic use. The testimony of other witnesses showed that the lands

through which the brook runs, into which the drainage from the cemetery emptied, would be unfitted for dairy purposes and stock-raising, by reason of the contamination of the water by the sewer.

We have read and considered all the evidence with care, and are of the opinion that it sustains the conclusions reached by the master. In his report the master found that injurious products of decomposition do emanate from animal bodies buried in the earth; that these emanations do enter into the soil in which said bodies are buried; that the surface water, percolating through the soil, takes up these emanations; that if the sewer referred to in Exhibit A is constructed, with the lateral drains extending into the said cemeteries referred to in the bill of complaint filed in this cause, these unwholesome products of decomposition will percolate through the soil and penetrate the sewer, and will be carried by the said sewer and empty into the spring brook, and that the contents of the said sewer will contaminate the waters of the spring brook to a greater extent than they are now contaminated from any cause shown to exist, and will contaminate the waters of the said spring brook to a greater extent than they would be contaminated from any natural cause, or from any conditions existing prior to the construction of the proposed sewer referred to in Exhibit A; and that the preponderance of the evidence on the main issue was in favor of the complainants, and that the material allegations of their bill were sustained. The circuit court sustained exceptions to this report and dismissed the bill, and its decree has been affirmed by the appellate court. In this we think there was error. The very purpose of the sewer was to furnish underdrainage, as well as surface drainage, to these cemeteries. Some portions of their grounds were so wet and swampy that water would rise in openings for graves, when dug, to such an extent as to compel their abandonment, and the selection of more elevated ground in their stead. It is true it

was shown that some of the highways of the town would be drained and benefited ; but the chief purpose and object in view was to furnish cemetery drainage, and, to accomplish this, the cemetery companies were willing, and agreed, to pay the whole expense. Experienced bacteriologists testified that, if the sewer were constructed and finished as contemplated, poisonous exudations would be carried from decomposing human bodies by the percolating waters into the sewer, and from thence into the spring brook, polluting and contaminating its waters, and rendering them unfit for use for man or beast, dangerous to the health of those who should use the water for drinking or domestic purposes, or who should use the milk of cows that drank from the brook, and that ice which should be harvested from ponds formed by the brook upon the lands of complainant Reeder would be of a very pernicious quality. There was some conflict in the evidence on the question as to whether or not the stream would be thus polluted by the sewer, but we think the clear preponderance of the evidence sustains the finding of the master that it would be. It would also seem to accord with the common opinion of mankind that under-drains in wet and marshy land filled with decaying bodies, leading into a running brook flowing within a mile of such land, would pollute the waters of the brook. The evidence does not show, nor does experience or science appear to teach, just how far this pollution would continue in the flowing waters. One witness testified that it might continue from five to fifty miles before the purification would become complete, but we think it clearly appears that the waters would probably be contaminated by this sewer while flowing through the lands of all the complainants. Some of these lands were immediately below the mouth of the sewer, and the furthest was within four miles. The brook is small, but perennial. It is fed along its course below the mouth of the sewer by small springs of pure water rising from the bed of the stream. It flows through the private

property of complainants. They used its water for stock, for cows kept for dairy purposes, for making ice, and at times for domestic purposes.

The defendants attempted to break the force of the case made by complainants by showing that the waters of the brook, and the springs along its course, were already polluted by the washings from manured lands used in gardening, and from decaying vegetables and other refuse matter, and were successful in showing that in wet weather the waters of this stream were rendered impure from these causes. They also showed that another drain, of a somewhat similar kind, from Mt. Hope Cemetery, discharged its waters into a ravine which in wet weather carried such waters into the brook in question at a point below the land of some of the complainants, and above that of others. But we know of no rule of law that sanctions one wrong because another has preceded it. It is doubtless true that streams of water cannot be kept as pure when flowing through lands occupied by populous communities as when flowing through sparsely-settled lands; but these effects that unavoidably arise from the occupation and cultivation of the soil by man do not justify the deliberate pollution of a stream of water flowing through private property, in order that the interests of private persons, or even of the public, may be enhanced thereby. There are few streams of water flowing through a densely-populated country which are not more or less polluted from general causes arising from the occupation and cultivation of the adjacent lands. The courts have no power to prevent pollution so occurring: 28 Am. & Eng. Enc. Law, 971, note; Mayor, etc., of Baltimore v. Warren Mfg. Co., 59 Md. 96. But it is a well-recognized branch of equity jurisdiction to restrain by injunction the fouling of running streams that pass over the lands of others, by connecting sewers therewith, or by other means, so as to endanger the comfort and health of others, or to cause

irreparable injury to their property rights: 2 High, Inj. p. 508, §§ 794, 795; *People v. City of St. Louis*, 5 Gilman, (Ill.) 351; *Wahle v. Reinbach*, 76 Ill. 322; *Metropolitan City Ry. Co. v. City of Chicago*, 96 Ill. 620; *Minke v. Hopeman*, 87 Ill. 450; *Catlin v. Valentine*, 9 Paige Ch. (N. Y.) 575; *Lyon v. McLaughlin*, 32 Vt. 423; *Village of Dwight v. Hayes*, 150 Ill. 273, 37 N. E. Rep. 218. And the mere fact that in the case at bar, the waters of this stream may have, to some extent, been rendered unwholesome when flooded by the washings from manured lands, or by the connections of other drains, is no excuse for the threatened pollution by the cemetery companies: 28 Am. & Eng. Enc. Law, 968, 974. It is declared by § 221 of the Criminal Code to be a public nuisance "to corrupt or render unwholesome or impure the water of any spring, river, stream, pond or lake, to the injury or prejudice of others," and the offence is punishable by indictment; but the "bare fact that the statute gives a remedy by indictment does not deprive the court of its equitable powers:" *Minke v. Hopeman*, 87 Ill. 450. In *Wahle v. Reinbach*, 76 Ill. 322, it was held that a bill would lie to enjoin the erection of a privy so near to complainant's dwelling and well of water as that it would become injurious to the health and comfort of himself and family, and, after citing previous decisions of this court, it was said: "These cases, however, recognize the doctrine which is supported by all the authorities on this branch of equity jurisdiction, that where the injury resulting from the nuisance is, in its nature, irreparable, as when loss of health, loss of trade, destruction of the means of subsistence, or permanent ruin to property will ensue from the wrongful act or erection, courts of equity will interfere by injunction, in furtherance of justice and the violated rights of property." Injunctive relief will be granted to prevent one proprietor from causing filthy or contaminated water to percolate from his soil into adjoining lands to the injury of his neighbor: 27 Am & Eng. Enc. Law, 437. The evidence does not sustain

appellees' contention that the purpose of the sewer is mere surface drainage, or the carrying off more rapidly of waters from the surface of the cemetery grounds, which, by the slower process of percolation and natural drainage, would eventually find their way to the same stream, and in a more impure condition. The contract shows that the sewer was to be at all times kept open, and to be used by the two cemeteries for carrying away all surface water, and as a drain for said cemeteries, and the plan and purpose of construction show that one of its principal objects was the underdraining of the wet and swampy portions of the cemeteries; and much the larger portion of the evidence relates to the effect the decaying bodies buried in the cemetery would have on the percolating waters which it is intended the sewer should carry off into this brook. In *Robb v. Village of La Grange*, 158 Ill. 21, 42 N. E. Rep. 77, it was said that "under the rulings of this court, which we believe to be in harmony with the current of authority bearing on the question, a village or city cannot run its sewerage beyond the incorporated limit, and empty it on the adjoining premises of some landowner, where a stench is created and the sewage is detrimental to the health of the neighborhood. Nor will a village or incorporated town be permitted to empty its sewage into a stream of water where the result is the pollution of the stream. In other words, if a nuisance is established by carrying the sewage of a village, incorporated town, or city, in a drain or sewer, beyond the limits of the incorporation, a bill in equity will lie on behalf of any person injured. The real question in this case is whether the evidence is sufficient to establish a nuisance." And in view of the fact that the witnesses were examined in open court in that case when the issue was heard, and that the trial judge, at the request of the parties, went upon the *locus in quo*, and personally viewed the premises, and found, as a matter of fact, no nuisance was created, this court declined to reverse such finding, but did hold that

in view of the fact that the bill was filed before the sewer was completed, and the trial was had before it could be satisfactorily determined whether the final result of the sewer would be to create a nuisance or not, the bill should have been dismissed without prejudice. Under the facts proved in the case at bar, we are satisfied, as found by the master, that a nuisance would be created, and that the decree should have been for the complainants.

The town of Worth filed a cross bill to set aside the contract on the ground that the commissioners had no power to make it, and because it was not made or authorized at any meeting of the commissioners. It is plain that neither party had any right by contract to authorize the pollution of the stream in question. But we see no occasion for setting aside the contract. It will be time enough to consider how far the town is bound when its liability under the contract is asserted or denied in some proceeding making such consideration necessary. We hold, therefore, that the circuit court erred in dismissing the bill of complaint, but did not err in dismissing the cross bill. The judgment of the appellate court and the decree of the circuit court, except as to the dismissal of the cross bill, are reversed, and the cause is remanded to the latter court, with directions to enter a decree in accordance with the prayer of the bill of complaint. Reversed and remanded.

POLLUTION OF WATER.

1. Pollution of Stream—Damages.—The riparian proprietors have only a right to use the water of a stream as it flows through their land; not to diminish or increase it, or change its character or quality in any way. Accordingly, if one riparian owner pollutes or defiles the water to such an extent that an injury is thereby done to the riparian owners below, *e. g.*, so that they cannot use it for the purposes for which they have been accustomed to use it, his act constitutes an actionable nuisance, and he will be liable in damages for the injury done:

Tennessee Coal, Iron & R. R. Co. *v.* Hamilton, 100 Ala. 252; Drake *v.* Lady Ensley Coal, Iron & Ry. Co., 102 Ala. 501; People *v.* Elk River Mill & Lumber Co., 107 Cal. 214; Brown *v.* Illius, 27 Conn. 84; Tate *v.* Parrish, 7 T. B. Mon. (Ky.) 325; Kinnaird *v.* Standard Oil Co., 89 Ky. 468; Price *v.* Lawson, 74 Md. 499; Sherman *v.* Fall River Iron Works Co., 5 Allen, (Mass.) 213; Red River Roller Mills *v.* Wright, 30 Minn. 249; Mississippi Mills Co. *v.* Smith, 69 Miss. 299; Gawtry *v.* Leland, 31 N. J. Eq. 385; Jutte *v.* Hughes, 67 N. Y. 267; Daggett *v.* Cohoes, 7 N. Y. Suppl. 882; Smith *v.* Cranford, 84 Hun, (N. Y.) 318; Columbus & H. Coal & Iron Co. *v.* Tucker, 48 Ohio St. 41; Crosland *v.* Pottsville, 126 Pa. 511; Hindson *v.* Markle, 171 Pa. 138; Gulf, C. & S. F. Ry. Co. *v.* Reed, (Tex.) 22 S. W. Rep. 283; Beard *v.* Murphy, 37 Vt. 99; Winna *v.* Rutland, 52 Vt. 481. In some states, the pollution of a stream which forms the water supply of a village is prohibited by statute: Acts Utah, 1892, p. 70, c. 63; People *v.* McCune, (Utah,) 46 Pac. Rep. 658.

2. Pollution of Stream—Injunction.—If the injury threatened be irreparable, or continuous, so that an action for damages will not afford an adequate remedy, equity will restrain the pollution of a stream by one riparian proprietor to the injury of others; whether the pollution be by draining into it the waste products of a mill or other noxious matter, such as the manure from a cattle yard and the like: Aldred's Case, 9 Co. 57 *b.*; Bealey *v.* Shaw, 6 East, 208; Mason *v.* Hill, 5 B. & Ad. 1; Swindon Waterworks Co. *v.* Wilts & Berks Canal Nav. Co., 7 L. R. H. L. 697; Baxendale *v.* McMurray, 2 L. R. Ch. 790; Clowes *v.* Staffordshire Co., 8 L. R. Ch. 125; Crossley & Sons *v.* Lightowler, 2 L. R. Ch. 478, affirming 3 L. R. Eq. 279; Pennington *v.* Brinsop Hall Coal Co., 5 Ch. D. 769; Webb *v.* Portland Mfg. Co., 3 Sumn. (U. S.) 189; Indianapolis Water Co. *v.* American Strawboard Co., 53 Fed. Rep. 970; *Id. v. Id.*, 57 Fed. Rep. 1000; Glassell *v.* Verdugo, 108 Cal. 503; People *v.* Elk River Mill & Lumber Co., 107 Cal. 214; Jessup & Moore Paper Co. *v.* Ford, 6 Del. Ch. 52; Lockwood Co. *v.* Lawrence, 77 Me. 297; Woodyear *v.* Schaefer, 57 Md. 1; Mayor of Baltimore *v.* Warren Mfg. Co., 59 Md. 96; Harris *v.* Mackintosh, 133 Mass. 228; Martin *v.* Glea-

son, 139 Mass. 183; *Holsman v. Boiling Spring Bleaching Co.*, 14 N. J. Eq. 335; *Beach v. Sterling Iron & Zinc Co.*, 54 N. J. Eq. 65; *Gardner v. Newburgh*, 2 Johns. Ch. (N. Y.) 162; *Chipman v. Palmer*, 77 N. Y. 51; *Townsend v. Bell*, 62 Hun, (N. Y.) 306; *Sanderson v. Penna. Coal Co.*, 86 Pa. 401; *Getting v. Union Imp. Co.*, 7 Kulp, (Pa.) 493; *Rudolph v. Dobson*, 11 Montg. Co. Rep. (Pa.) 197; *Rarick v. Smith*, 17 Pa. C. C. 627; *Richmond Mfg. Co. v. Atlantic De Laine Co.*, 10 R. I. 106; *Middlestadt v. Waupaca Starch & Potato Co.*, 93 Wis. 1; or by the discharge of sewage into it: *Atty. Gen. v. Birmingham*, 4 Kay & J. 528; *Oldaker v. Hunt*, 6 De G., M. & G. 376, affirming 19 Beav. 485; *Lingwood v. Stowmarket Co.*, 1 L. R. Eq. 77; *Goldsmid v. Tunbridge Wells Imp. Comrs.*, 1 L. R. Ch. 349, affirming 1 L. R. Eq. 161; *Atty. Gen. v. Bradford Canal*, 2 L. R. Eq. 71; *Atty. Gen. v. Colney Hatch Lunatic Asylum*, 4 L. R. Ch. 146; *Atty. Gen. v. Leeds Corporation*, 5 L. R. Ch. 583; *Holt v. Rochdale*, 10 L. R. Eq. 354; *Morgan v. Danbury*, 67 Conn. 484; *Dwight v. Hayes*, 150 Ill. 273; *Robb v. La Grange*, 158 Ill. 21, modifying 57 Ill. App. 386; *Newark Aqueduct Board v. City of Passaic*, 45 N. J. Eq. 393; *Vick v. Rochester*, 46 Hun, (N. Y.) 607; *Chapman v. Rochester*, 110 N. Y. 273; *Belton v. Baylor Female College*, (Tex.) 33 S. W. Rep. 680. Thus, in *Barton v. Union Cattle Co.*, 28 Neb. 350, the defendant, an upper riparian owner, kept some 3,700 head of cattle, the droppings from which were conveyed to an ordinary creek by means of sewers, polluting its waters so that they were unfit for use, and tainting the atmosphere with effluvia. This was held to be such a nuisance as would be enjoined at the suit of a lower riparian owner.

The pollution need not be such as to render the water of the stream unfit for all purposes; it is enough to warrant an injunction if it be rendered unfit for the purposes for which the complainant uses it: *Middlestadt v. Waupaca Starch & Potato Co.*, 93 Wis. 1. In *Young v. Bankier Distillery Co.*, [1893] A. C. 691, affirming 19 Ct. of Sess. Cas. (4th Ser.) 1083, the plaintiff had for years used the water of a stream, which was soft and well suited for the purpose, in distilling whisky. The defendants, proprietors of a coal mine further up the stream, began to discharge water pumped from their workings into the stream.

This water, though pure enough in other respects, was very hard, and was pumped in such quantities as to totally unfit the water of the stream for use in distillation. The court below enjoined the pollution of the stream by the defendants, and this order was affirmed by the House of Lords. But in order to warrant the granting of an injunction the pollution must be continuous, not merely accidental and temporary: *Cooke v. Forbes*, 5 L. R. Eq. 166; and must be actual, not threatened merely: *Cushman v. Highland Ditch Co.*, 3 Colo. App. 437; and the water must be pure enough for use before the pollution complained of. If it was polluted previously, so as to render it unfit for use, an additional pollution is no ground for injunction: *Topeka Water Supply Co. v. Potwin Place*, 43 Kans. 404. Moreover, the natural drainage of the land cannot be restrained, although it necessarily brings many impurities to the stream: *Wood v. Sutcliffe*, 2 Sim. N. S. 163; and as a certain amount of pollution is an inevitable accompaniment of the use of the water of a stream for any purpose, the question of injunction must always depend on the reasonableness of the amount of pollution. If it is slight, an injunction will not be granted: *Atty. Gen. v. Gee*, 10 L. R. Eq. 131; *Clifton Iron Co. v. Dye*, 87 Ala. 468; *Merrifield v. Worcester*, 110 Mass. 216; *Bainard v. Newton*, 154 Mass. 255; *Hayes v. Waldron*, 44 N. H. 580; *State v. Board of Chosen Freeholders*, 46 N. J. Eq. 173; *Snow v. Parsons*, 28 Vt. 459.

3. Pollution of Stream by Mining Operations.—Since the whole doctrine of nuisance rests upon the principle of *sic utere tuo ut alienum non lædas*, it would naturally follow that the pollution of a stream by the discharge into it of refuse and water from a mine would give a right of action for damages and be ground for an injunction; and such has been the general rule: *Young v. Bankier Distillery Co.*, [1893] A. C. 691, affirming 19 Ct. of Sess. Cas. (4th Ser.) 1083. It is no defence, therefore, that the pollution was the necessary result of the mining operations: *Beach v. Sterling Iron & Zinc Co.*, 54 N. J. Eq. 65. This rule prevails almost everywhere but in Pennsylvania, where one notorious case is opposed to the general current of authority. In *Penna. Coal Co. v. Sanderson*, 113 Pa. 126, it was held that the pumping of sulphur water from a coal mine,

which flowed into a brook and rendered it totally unfit for domestic use, was not such a nuisance as would entitle the lower riparian owners to recover damages. The case had already been before the supreme court twice, in *Sanderson v. Penna. Coal Co.*, 86 Pa. 401, and *Penna. Coal Co. v. Sanderson*, 94 Pa. 302, and each time the court decided in favor of the lower owner. But on this third hearing an aggressive person succeeded in changing the views of a bare majority of the court to suit his preconceived opinions. In commenting on this case, it is unnecessary to do more than quote the words of Lord SHAND, in *Young v. Bankier Distillery Co.*, [1893] App. Cas. 691, 700: "In that case undoubtedly the court held that the owners of a mine were entitled to pump up water from the lower strata of the mine, and to send it into an adjoining stream, although the quantity of the water was thereby increased and its quality so affected as to render it totally unfit for domestic purposes by the lower riparian owners. The case had been twice previously before the court, and on both occasions the judgment was given against the mine owners. On the third occasion, which occurred in consequence of a third trial to assess the damages, the jury found a very large sum due to the lower owner; but the verdict was quashed, and the whole case reconsidered with reference to the legal rights of the parties, and with the results I have stated. In a court of seven judges there were three who dissented from the judgment, including the chief justice of the state. This circumstance and the grounds of the judgment seem to me to be sufficient to deprive the case of any real weight. These grounds appear to me from a perusal of the judgment to be fairly stated in the head-note as follows: 'The use and enjoyment of a stream of pure water for domestic purposes by the lower riparian owners, who purchased their land, built their houses, and laid out their grounds before the opening of the coal mine, the acidulated waters from which rendered the stream entirely useless for domestic purposes, must *ex necessitate* give way to the interests of the community, in order to permit the development of the natural resources of the country, and to make possible the prosecution of the lawful business of mining coal.' I shall only add, that while the enormous value of the mining interests in the district of Pennsylvania, from

which the case came, and which is fully explained in the judgment, might have formed a good reason for appealing to the legislature to pass a special measure to restrain any proceeding by interdict, at the instance of surface proprietors, and to confine them to a right to damages only for injury sustained, that value could in my opinion afford no good legal ground for allowing the proprietor of a mine so to work his minerals for his own profit as to destroy or greatly injure his neighbor's estate by subjecting it, by means of artificial operations, to the burden of receiving water enlarged in quantity and destroyed in quality without payment of compensation or damages for the injury done. The case has no application to the present, because the decision was based on special circumstances as to the great relative value of the minerals as compared with the surface in the district; and because in any view the decision seems to me to have been making law rather than interpreting the law so as to give effect to sound, just and well-recognized principles as to the common interest and rights of upper and lower proprietors in the running water of a stream." The only important case that has adopted the language of the Sanderson case is *Barnard v. Sherley*, 135 Ind. 547, where the defendants, who had sunk an artesian well on their own premises, turned the water into a stream that flowed across the plaintiff's land, that being the natural and only possible way of escape for it. Afterwards, finding that it possessed some medicinal properties, they built a sanitarium for the treatment of various diseases, and bathed the patients with the water, discharging it as before into the stream. The plaintiff sued for damages and an injunction; but the court refused to hold the defendants liable. There were, however, many features to distinguish this from the Sanderson case, so that the adoption of the language of the latter was unnecessary. In the first place, the pollution was slight; in the second, before the water reached the plaintiff's premises, it was further defiled by passing through a city; either of which would tend to defeat the claim, apart from all other considerations. Even in Pennsylvania, the doctrine of the Sanderson case is carefully limited to the natural drainage of the mine water; and any other means of getting rid of it will be enjoined. Thus, in *Getting v. Union Imp. Co.*, 7 Kulp,

(Pa.) 493, the defendant company had constructed a tunnel five miles long, at a cost of \$2,500,000, through a mountain separating two creeks, in order to drain some flooded mines into a lower level than that of their natural drainage, rendering possible the mining of 15,000,000 tons of coal at a profit. An injunction was not asked for by those who lived along the creek, until the company was ready to open the tunnel into the flooded workings. The injunction was granted as prayed for, on the ground that the creek into which the tunnel opened was not the natural drainage channel of the mines, thus distinguishing Sanderson's case; but on proof that the admixture of a certain percentage of the mine water would not make the creek water unfit for use, it was modified so as to restrain the defendant from discharging the mine water in such quantities as to overflow the banks of the creek.

4. Pollution of Percolating Waters.—The pollution of percolating waters, by depositing filth or noxious matter on one's own premises, from which it percolates through the soil to another's, is a good cause of action for damages: *Smith v. Kenrick*, 7 C. B. 515; *Wood v. Waud*, 3 Exch. 748; *Embrey v. Owen*, 6 Exch. 353; *Humphries v. Cousins*, 2 C. P. D. 239; *Snow v. Whitehead*, 27 Ch. D. 588; *Ballard v. Tomlinson*, 29 Ch. D. 115; *Robinson v. Black Diamond Coal Co.*, 57 Cal. 412; *Consolidated Home Supply Ditch & Reservoir Co. v. Hamlin*, 6 Colo. App. 341; *Ottawa Gas Light & Coke Co. v. Graham*, 28 Ill. 73; *Ottawa Gas Light & Coke Co. v. Thompson*, 39 Ill. 598; *Decatur Gas Light Co. v. Howell*, 92 Ill. 19; *Louisville & N. R. Co. v. Simpson*, (Ky.) 33 S. W. Rep. 395; *Woodward v. Aborn*, 35 Me. 271; *Ball v. Nye*, 99 Mass. 582; *Wilson v. New Bedford*, 108 Mass. 261; *Perrine v. Taylor*, 43 N. J. Eq. 128; *Frazier v. Brown*, 12 Ohio St. 294; *Pottstown Gas Co. v. Murphy*, 39 Pa. 257; *Haugh's Appeal*, 102 Pa. 42; *Collins v. Chartiers Valley Gas Co.*, 131 Pa. 143; *Hauck v. Tidewater Pipe Line Co.*, 153 Pa. 366; *Good v. Altoona City*, 162 Pa. 493; *Gavigan v. Atl. Ref. Co.*, 3 Pa. Super. Ct. 628; and an injunction will also be granted to restrain the pollution of percolating waters: *Turner v. Mirfield*, 34 Beav. 390; especially in the case of the erection of a privy or cess-pool near a well or house:

Womersley v. Church, 17 L. T. N. S. 190; De Give v. Seltzer, 64 Ga. 423; Wahle v. Reinbach, 76 Ill. 322; Rand v. Wilber, 19 Ill. App. 395; Iliff v. School Directors, 45 Ill. App. 419; Radican v. Buckley, 138 Ind. 582; Miley v. A'Hearn, (Ky.) 18 S. W. Rep. 529; or of a cemetery or private burial ground: Kingsbury v. Flowers, 65 Ala. 479; Clark v. Lawrence, 6 Jones Eq. (N. C.) 83; Henry v. Trustees of Perry Twp., 48 Ohio St. 671; Dunn v. Austin, 77 Tex. 139; but in such cases the fact of nuisance must be clearly proved.

Patents—Use by Employer—Recovery of Royalty by Employee—Claim against United States Government—Estoppel.

GILL v. UNITED STATES.

(Supreme Court of the United States. January 6, 1896.)

(160 U. S. 426; 16 Sup. Ct. Rep. 322.)

An employe, paid by salary or wages, who devises an improved method of doing his work, using the property or labor of his employer to put his invention into practical form, and assenting to the use of such improvements by his employer, cannot, by taking out a patent upon such invention, recover a royalty or other compensation for such use.

The fact that the employe made the invention out of working hours, and that he used neither the property of his employer, the government, nor the services of its employes, in conceiving, developing or perfecting the inventions, is immaterial, if the cost of preparing the patterns and working drawings of the machines, as well as the cost of constructing the machines that were made in putting the invention into practical use, was borne by the government, the work being also done under the immediate supervision of the employe.

The mere fact that a person is in the employ of the government does not preclude him from making improvements in the machines with which he is connected, and obtaining patents therefor as his individual property.

Inventions made by an employe in a government arsenal were adopted in the work of the arsenal by the commanding officer at the employe's

suggestion. The patterns and working drawings were prepared at the cost of the government, and the machines embodying the inventions were also built at its expense. The employe did not bring his inventions before any government agent as the subject of purchase and sale, and did not object to their use by the government, nor did the commanding officer undertake to incur any legal or pecuniary obligation on the part of the government for the use of the inventions or the right to manufacture thereunder. The employe's wages were advanced from time to time, and this was in part due to his practical ability as an inventor and the value of his inventions to the government. *Held*, that the employe acquiesced in the use of his invention by the government so as to be estopped from making any claim on account of the latter's use of it.

Appeal from Court of Claims.

Claim by Jabez H. Gill against the United States. From a judgment of the court of claims dismissing the claim, the claimant appeals. Affirmed.

This was a suit by Gill to recover of the United States the sum of \$94,693.04 upon an implied contract for the use of certain machines covered by letters patent issued to the claimant.

The petition alleged, in substance, that from March, 1864, to March, 1881, the claimant was employed as machinist, foreman and draftsman at the Frankford Arsenal, in the state of Pennsylvania, and since March, 1881, as master armorer at such arsenal, receiving during the term of his employment a per diem compensation for his services. His engagement required him to perform manual labor and to exercise his mechanical skill in the service of the government, but did not require the exercise of his inventive genius in such service, nor secure to the government the right to use any of his inventions without compensation.

That at sundry times from 1869 to 1882 six patents were granted to him—for a cartridge-loading machine, a weighing machine, a gauging machine, a cartridge anvil, a heading machine and a priming tool for reloading; that at different times he assigned to individuals or corporations all these inventions, but reserved to the government the right to use them.

The petition further alleged that the reasonable value of such use by the government amounted to the sum of \$94,693.04, no part of which had ever been paid; that no action upon the claim had been had in any department of the government beyond repeated acknowledgments, by the ordnance department, of claimant's right to compensation for the use of the inventions.

The government made a general denial of the allegations of the petition, and submitted the case to the court of claims, which made a finding of facts, the material portions of which are as follows:

(1) During the period of time within which the claimant invented the devices hereafter mentioned he was in the defendant's employment, and received wages or a salary for his services. The terms of his employment required him to exercise his mechanical skill in the service of the defendants, but did not require the exercise of his inventive genius in such service, nor secure to the defendants the right to use any inventions of the claimant without compensation therefor.

Letters patent of the United States were granted to the claimant, while in the service of the defendants, as follows: No. 97,904, dated December 14, 1869, for a cartridge-loading machine; No. 185,858, dated January 2, 1877, for a cartridge-weighing machine; No. 208,903, dated October 15, 1878, for a cartridge-gauging machine; No. 220,472, dated October 14, 1879, for a cartridge anvil; No. 241,962, dated May 24, 1881, for a cartridge-heading machine; No. 257,860, dated May 16, 1882, for a priming tool for re-loading.

(2) The manner in which the inventions above referred to originated and came into the use of the government was as follows:

In 1867 the claimant, being a machinist or skilled mechanic in the Frankford Arsenal, and getting as compensation \$4 a day, came to Gen. Benét, the commanding officer,

and suggested that an improvement could be made in the method of loading cartridges, and exhibited to the commanding officer then or subsequently his device for an improvement which is now embodied in patent No. 97,904.

General Benét, after due examination and consideration, authorized the construction of such a machine. The machine was built at a cost of \$500 by the United States, according to the design of the claimant. On its completion it proved to be thoroughly satisfactory to the commanding officer, who authorized the construction of a second machine. The construction of both took place under the immediate supervision of the claimant, and such supervision was a part of his ordinary duty and employment. Subsequently successive commanding officers ordered from time to time six other machines to be constructed, which in like manner were built under the immediate supervision of the claimant, and all of these eight machines were completed prior to the claimant filing his application for a patent.

After his patent had been issued, a ninth machine was also ordered, and in like manner constructed under the immediate supervision of the claimant. These machines have been used by the government at the Frankford Arsenal in the manufacture of cartridges, and continue in use to the present time.

(3) At no time did the claimant ever bring his invention before a commanding officer or other agent of the government as a subject of purchase and sale; nor did he ever raise an objection to the use of the invention as set forth in the preceding finding; nor did he ever enter into an express agreement, written or oral, whereby a license was granted or intended to be granted to the government to operate and use the machine described in the preceding finding, or whereby the claimant waived or intended to waive his legal or equitable right, if any, to compensation; nor did any commanding officer ever undertake or assume to incur a legal or pecuniary obligation on the part of the government

for the use of the invention or the right to manufacture thereunder.

The claimant was not employed to make inventions, nor assigned to that duty, and his invention, until it was reduced to paper in the form of an intelligible drawing, was made out of the hours of labor at the arsenal, and during the time which was properly his own, and the thought and time which he devoted to it were voluntarily given, as a good and earnest servant of the government intent on rendering more effective the work and machinery of the arsenal with which he was connected, and the work of so devising a machine was not an obligation imposed upon him by the authorities of the arsenal.

(4) The other inventions of the claimant, set forth in the patents enumerated in finding 1, except that of the heading machine, which was fabricated and used by the defendants under the supervision of the claimant, were also brought to the attention of the various commanding officers by suggestions from the claimant for making the means and appliances at the arsenal more efficient than they were; and in like manner the cost of preparing patterns for the iron and steel castings and of preparing working drawings and of constructing working machines was borne exclusively by the government; but the claimant did not use any property of the defendants, or the services of any employe of the defendants, in making or developing or perfecting the inventions themselves. In each case one or more machines or articles of manufacture embodying the invention had been constructed and was in operation or use in the arsenal with the claimant's knowledge and assent before he filed an application for a patent.

(5) In 1867, when the claimant made his first invention described in the patents hereinbefore enumerated, he was a machinist, rated as a skilled laborer in the Frankford Arsenal, but acting and doing the duty of a master armorer, on wages of \$4 a day. From time to time his wages were

advanced until they became, in 1881, \$6 a day, and he was in 1881 appointed master armorer, the duties of which are a general supervision of the shops. This increase of pay and advancement of position came through and by authority of the commanding officers of the arsenal, and the consideration or reason therefor was that the claimant was a faithful, intelligent and capable employe, whose services were of great value to the government.

It was never stipulated by any commanding officer, nor understood or agreed to by the claimant, that the advance of wages was to be a consideration for the use of his inventions, though the practical ability of the claimant as an inventor, and the value of his inventions to the government, did operate upon the minds of the officers in estimating the claimant's services and ordering his advancement.

(6) The claimant has sold the right to use his inventions, reserving the right to the government as set forth in finding 7, to various persons for sums amounting in the aggregate to \$5,380. But the use of the inventions by private manufacturers is not nearly so large as the use by the government, the inventions being specially adapted to military purposes and appliances.

It accordingly entered a judgment dismissing the claim upon the ground that, where an employe of the government takes advantage of his connection with it to introduce an unpatented device into the public service, giving no intimation at the time that he regards it as property, or that he intends to protect it by letters patent, but allows the government to test the invention at its own exclusive cost and risk by constructing machinery and bringing it into practical use before he applies for a patent, the law will not imply a contract; and that a contract will not be implied in favor of an employe who has thus placed a patented device in the public service, as to machines constructed and used after his patent has been obtained.

From this decree the claimant appealed to this court.

H. E. Paine, for appellant.

Assist. Atty. Gen. Dickinson, for the United States.

Mr. Justice BROWN, after stating the facts in the foregoing language, delivered the opinion of the court.

This case raises the question, which has been several times presented to this court, whether an employe paid by salary or wages, who devises an improved method of doing his work, using the property or labor of his employer to put his invention into practical form, and assenting to the use of such improvements by his employer, may, by taking out a patent upon such invention, recover a royalty or other compensation for such use. In a series of cases, to which fuller reference will be made hereafter, we have held that this could not be done.

The principle is really an application or outgrowth of the law of estoppel *in pais*, by which a person looking on and assenting to that which he has power to prevent, is held to be precluded ever afterwards from maintaining an action for damages. A familiar instance is that of one who stands by while a sale is being made of property in which he has an interest, and makes no claim thereto, in which case he is held to be estopped from setting up such claim. The same principle is applied to an inventor who makes his discovery public, looks on, and permits others to use it without objection or assertion of a claim for a royalty. In such a case he is held to abandon his inchoate right to the exclusive use of his invention, to which a patent would have entitled him, had it been applied for before such use. As was said by Mr. Justice STORY, in *Pennock v. Dialogue*, 2 Pet. 1, 16: "This inchoate right, thus once gone, cannot afterwards be resumed at his pleasure, for where gifts are once made to the public in this way they become absolute." "It is possible," said the trial court, in charging the jury, "that the inventor may not have intended to give the benefit of his discovery to the public, and may have supposed that by

giving permission to a particular individual to construct for others the things patented he could not be presumed to have done so. But it is not a question of intention which is involved in the principle we have laid down, but of legal inference, resulting from the conduct of the inventor, and affecting the interests of the public. It is for the jury to say whether the evidence brings this case within the principle which has been stated." This language was quoted with approval in *Grant v. Raymond*, 6 Pet. 218. So, also, in *Shaw v. Cooper*, 7 Pet. 292, 323, it was held directly that, "whatever may be the intention of the inventor, if he suffers his invention to go into public use, through any means whatsoever, without the immediate assertion of his right, he is not entitled to a patent."

The application of this principle to a single individual whom the patentee has permitted to make use of his invention without claiming compensation therefor, first arose in *McClurg v. Kingsland*, 1 How. 202. In this case the patentee, Harley, was employed by the defendants at their foundry upon weekly wages. While so employed he invented the patented improvements, making experiments in the defendants' foundry, and wholly at their expense. The result proving useful, his wages were increased. He continued in their employment, during all of which time he made rollers for them, spoke about procuring a patent, and finally made an application, which was granted. He assigned the patent to the plaintiffs, after the defendants had declined his proposition that they should take out a patent and purchase his right. He made no demand upon them for compensation for using his improvement, and gave them no notice not to use it, until a misunderstanding had arisen, when he left their employment, and made an agreement with the plaintiffs to assign his right to them. The defendants continuing to make the rollers on his plan, the action was brought by the plaintiffs, without any previous notice by them. It was held that the facts above stated justified

the presumption of a license to use the invention, and that the charge of the court that the defendants might continue to use it without liability to the plaintiffs was correct.

In the case of *Solomons v. U. S.*, 137 U. S. 342, 11 Sup. Ct. Rep. 88, one Clark, who was in the employ of the government as chief of the bureau of engraving and printing, conceived the idea of a self-cancelling stamp, and prepared a die or plate therefor, making use of the services of the employes of the bureau and the property of the government. While his application for a patent was pending, he assigned his rights to the appellant, Solomons, in payment of an account between them. On taking out the patent the appellant notified the commissioner of internal revenue that he was the owner of the patent, and demanded compensation for the use of the stamp on whisky barrels. It further appeared that Mr. Clark, as chief of the bureau, had been assigned the duty of devising a stamp for this purpose, and it was not understood or intimated that the stamp which he was to devise should be patented or become his personal property. Indeed, before the final adoption of the stamp, he said that the design was his own, but he should make no charge to the government therefor, as he was employed on a salary by the government, and had used its machinery and other property in the perfection of the stamp. It was held that, having been employed and paid to devise a new stamp, the invention, when accomplished, became the property of the government, and that the patentee had practically sold in advance whatever he might be able to accomplish in that direction.

A similar case was that of *Lane & Bodley Co. v. Locke*, 150 U. S. 193, 14 Sup. Ct. Rep. 78, in which an engineer and draftsman at a fixed salary, in the employ of the defendants, and using their tools and patterns, invented a stop valve, which the firm used with his knowledge in certain elevators constructed by them until its dissolution, and after that a corporation organized by the firm used it in the

same way and with the like knowledge. It was held that the patentee, having made no claim for remuneration for the use of the patent, saying that he did not desire to disturb his friendly relations with the firm, might be presumed to have recognized an obligation to permit them to use the invention.

In *McAleer v. U. S.*, 150 U. S. 424, 14 Sup. Ct. Rep. 160, there was an express license by an employe in the treasury department to such department and its bureaus of a right to make and use machines containing the improvements of the patentee to the end of the patented term, and it was held that this agreement could not be varied by parol evidence that it was to terminate upon the discharge of the patentee from the employment of the government.

In *Keyes v. Mining Co.*, 158 U. S. 150, 15 Sup. Ct. Rep. 772, a person in the employ of a smelting company invented a new method of withdrawing molten metal from a furnace, took out a patent for it, and permitted his employer to use it without charge so long as he remained in its employ, which was about ten years. It was held that there was at least an implied license to use the improvement without payment of royalties during the continuance of his employment, and also a license to use the invention upon the same terms and royalties fixed for other parties, from the time the patentee left the defendant's employment.

An attempt is made to differentiate the case under consideration from those above cited, in the fact, stated in the third finding, that the invention in this case, until it was reduced to paper, in the form of an intelligible drawing, was made out of the hours of labor at the arsenal, and during the time which properly belonged to the patentee; and that, by finding 4, "the claimant did not use any property of the defendants or the services of any of the employes of the defendants in making, or developing or perfecting the inventions themselves." This, however, must be taken in connection with the further finding that "the cost of pre-

paring patterns for the iron and steel castings, and of preparing working drawings and of constructing working machines, was borne exclusively by the government," and that in each case one or more machines or articles of manufacture embodying the invention had been constructed, and was in operation or use in the arsenal, with the claimant's knowledge and consent, before he filed an application for a patent. The inference to be deduced from the findings is, in substance, that, while the claimant used neither the property of the government nor the services of its employes in conceiving, developing or perfecting the inventions themselves, the cost of preparing the patterns and working drawings of the machines, as well as the cost of constructing the machines themselves that were made in putting the inventions into practical use, was borne by the government, the work being also done under the immediate supervision of the claimant.

There is an assumption by the claimant in this connection that, if he did not make use of the time or property of the government in conceiving and developing his ideas, the fact is an important one as distinguishing this case from those above cited. In view of the finding that he did make use of the property and labor of the government in preparing patterns and working drawings and constructing his working machines, the distinction is a very narrow one—too narrow, we think, to create a difference in principle, or to prevent the application of the rule announced in those cases. In *Solomons' case* the finding was that, while employed as chief of the bureau of engraving and printing, Clark conceived the idea of a self-cancelling stamp, and under his direction the employes of that bureau, using government property, prepared a die or plate, and put into being the conception of Mr. Clark.

In every case the idea conceived is the invention. Sometimes, as in the case of *McClurg v. Kingsland*, a series of experiments is necessary to develop and perfect the inven-

tion. At other times, as in the case under consideration, and apparently in the Solomons' case, the invention may be reduced to paper in the form of an intelligible drawing, when nothing more is necessary than the preparing of patterns and working drawings, and the embodiment of the original idea in a machine constructed accordingly. Now, whether the property of the government and the services of its employes be used in the experiments necessary to develop the invention, or in the preparation of patterns and working drawings and the construction of the completed machines, is of no importance. We do not care, in this connection, to dwell upon the niceties of the several definitions of the word "develop" as applied to an invention. The material fact is that in both this and the Solomons' case the patentee made use of the labor and property of the government in putting his invention into the form of an operative machine; and whether such employment was in the preliminary stage of elaborating and experimenting upon the original idea, putting that idea into definite shape by patterns or working drawings, or finally embodying it in a completed machine, is of no consequence. In neither case did the patentee risk anything but the loss of his personal exertions in conceiving the invention. In both cases there was a question whether machines made after his idea would be successful or not, and, if such machines had proven to be impracticable, the loss would have fallen upon the government.

In this connection, too, it should be borne in mind that the fact, upon which so much stress has been laid by both sides, that the patentee made use of the property and labor of the government in putting his conceptions into practical shape, is important only as furnishing an item of evidence tending to show that the patentee consented to and encouraged the government in making use of his devices. The ultimate fact to be proved is the estoppel, arising from the consent given by the patentee to the use of his inventions

by the government, without demand for compensation. The most conclusive evidence of such consent is an express agreement or license, such as appeared in the McAleer case; but it may also be shown by parol testimony, or by conduct on the part of the patentee proving acquiescence on his part in the use of his invention. The fact that he made use of the time and tools of his employer, put at his service for the purpose, raises either an inference that the work was done for the benefit of such employer, or an implication of bad faith on the patentee's part in claiming the fruits of labor which technically he had no right to enlist in his service.

There is no doubt whatever of the proposition laid down in Solomons' case, that the mere fact that a person is in the employ of the government does not preclude him from making improvements in the machines with which he is connected, and obtaining patents therefor, as his individual property, and that in such case the government would have no more right to seize upon and appropriate such property than any other proprietor would have. On the other hand, it is equally clear that if the patentee be employed to invent or devise such improvements, his patents obtained therefor belong to his employer, since in making such improvements he is merely doing what he was hired to do. Indeed, the Solomons' case might have been decided wholly upon that ground, irrespective of the question of estoppel, since the finding was that Clark had been assigned the duty of devising a stamp, and it was understood by everybody that the scheme would proceed upon the assumption that the best stamp which he could devise would be adopted and made a part of the revised scheme. In these consultations it was understood that he was acting in his official capacity as chief of the bureau of engraving and printing, but it was not understood or intimated that the stamp he was to devise would be patented or become his personal property. In fact, he was employed and paid to do the very thing which he did, viz., to devise an improved

stamp; and, having been employed for that purpose, the fruits of his inventive skill belonged as much to his employer as would the fruits of his mechanical skill. So, if the inventions of a patentee be made in the course of his employment, and he knowingly assents to the use of such inventions by his employer, he cannot claim compensation therefor, especially if his experiments have been conducted or his machines have been made at the expense of such employer.

The following remarks of the court in the *Solomons'* case (page 346, 137 U. S., and page 88, 11 Sup. Ct. Rep.) are pertinent in this connection: "So, also, when one is in the employ of another in a certain line of work, and devises an improved method or instrument for doing that work, and uses the property of his employer and the services of other employes to develop and put in practical form his invention, and expressly assents to the use by his employer of such invention, a jury, or a court trying the facts, is warranted in finding that he has so far recognized the obligations of service flowing from his employment, and the benefits resulting from the use of the property and the assistance of the co-employes of his employer, as to have given to such employer an irrevocable license to use such invention."

The acquiescence of the claimant in this case in the use of his invention by the government is fully shown by the fact that he was in its employ; that the adoption of his inventions by the commanding officer was procured at his suggestion; that the patterns and working drawings were prepared at the cost of the government; that the machines embodying his inventions were also built at the expense of the government; that he never brought his inventions before any agent of the government as the subject of purchase and sale; that he raised no objection to the use of his inventions by the government; and that the commanding officer never undertook to incur a legal or pecuniary obligation on

the part of the government for the use of the inventions or the right to manufacture thereunder. It further appeared that from time to time his wages were advanced from \$4 to \$6 a day, and while it was never stipulated by the commanding officer or understood by the claimant that the advance of wages was a consideration for the use of the inventions, the practical ability of the claimant as an inventor, and the value of his inventions to the government, did operate on the minds of the officers in estimating the claimant's services and ordering his advancement.

Clearly, a patentee has no right, either in law or morals, to persuade or encourage officers of the government to adopt his inventions, and look on while they are being made use of year after year without objection or claim for compensation, and then to set up a large demand, upon the ground that the government had impliedly promised to pay for their use. A patentee is bound to deal fairly with the government, and, if he has a claim against it, to make such claim known openly and frankly, and not endeavor silently to raise up a demand in his favor by entrapping its officers to make use of his inventions. While no criticism is made of the claimant, who was a simple mechanic, and, as found by the court of claims, "a faithful, intelligent and capable employe, whose services were of great value to the government," and whose conduct was "fair, honest and irreproachable," and while the government appears to have profited largely by his inventive skill, we are of opinion, for the reasons above stated, that the appeal in his behalf should be addressed to the generosity of the legislative, rather than to the justice of the judicial department.

It may be added, in this connection, that the inventions which the claimant suggested to the commanding officer to adopt were mere undeveloped conceptions of his own, that had never been embodied in a machine; that it was uncertain at this time whether he could or would obtain patents for them. If he did not obtain patents, their use was open

to anybody. Under such circumstances it is impossible to say that an officer of the government, conceiving that he had full authority to make use of them, agreed by their adoption to pay for the value of the use of such machines under patents that might be applied for and granted in the future.

We are clearly of opinion that the case is covered by our former decisions, and that the judgment of the court below must be affirmed.

RIGHTS OF EMPLOYER IN PATENT TAKEN OUT BY EMPLOYEE.

The rule that the discoverer and maker of an invention is entitled to the exclusive profit of that invention during the period prescribed by the patent laws, on taking out a patent therefor, is subject to a very important exception, in the case of an employe who makes an invention under an express contract of hiring for that purpose, or under circumstances which make it his duty to allow the use of the invention to his employer.* "If one is employed to devise or perfect an instrument, or a means for accomplishing a prescribed result, he cannot, after successfully accomplishing the work for which he was employed, plead title thereto as against his employer. That which he has been employed and paid to accomplish becomes, when accomplished, the property of his employer. Whatever rights as an individual he may have had in and to his inventive powers, and that which they are able to accomplish, he has sold in advance to his employer. So, also, when one is in the employ of another in a certain line of work, and devises an improved method or instrument for doing that work, and uses the property of his employer and the services of other employes to develop and put in practicable form his invention, and explicitly consents to the use by his employer of such invention, a jury, or a court trying the facts, is warranted in finding that he has so far recognized the obligations of service flowing from his employment and the benefit resulting from his use of the property, and the assistance of the co-employes of his employer, as to have given to

such employer an irrevocable license to use such invention:" BREWER, J., in *Solomons v. United States*, 137 U. S. 342, affirming 22 Ct. of Cl. 335. Accordingly, (1) when an employe has been hired for the express purpose of making an invention for the benefit of his employer, or (2) when the making of it falls within the scope of his employment, and he uses his employer's time and materials in making it, the latter has a right to use the invention, especially if he has paid a bonus to the employe for making it, or increased his wages : *McClurg v. Kingsland*, 1 How. 202 ; *Davis v. United States*, 23 Ct. of Cl. 329 ; and, in the first case, has an equitable title to the patent, without an assignment thereof, and can compel an assignment, if the contract stipulates for it : *Continental Windmill Co. v. Empire Windmill Co.*, 8 Blatchf. (U. S.) 295 ; *Bonsack Mach. Co. v. Hulse*, 57 Fed. Rep. 519 ; *Joliet Mfg. Co. v. Dice*, 105 Ill. 649 ; *Connelly Mfg. Co. v. Wattles*, 49 N. J. Eq. 92 ; *Baldwin v. Von Micheroux*, 83 Hun, (N. Y.) 43, affirming 25 N. Y. Suppl. 857 ; *Dempsey v. Dobson*, 174 Pa. 122 ; see *McAlcer v. United States*, 150 U. S. 424, affirming 25 Ct. of Cl. 238 ; though he cannot claim an invention made after the agreement or service has expired : *Appleton v. Bacon*, 2 Black, (U. S.) 699. But, unless the contract expressly stipulates for an assignment of the patent, he cannot compel it, and is only entitled to a license to use it ; which is also all that he can claim in the second case : *Hapgood v. Hewitt*, 119 U. S. 226 ; *McWilliams Mfg. Co. v. Blundell*, 11 Fed. Rep. 419 ; *Dalzell v. Dueber Mfg. Co.*, 149 U. S. 315, reversing 38 Fed. Rep. 597 ; *Green v. Willard Barrel Co.*, 1 Mo. App. 202. So, if the invention is not within the scope of the employe's duties, but is wholly outside of them, the fact that his employer's time and materials are consumed in the making of it does not vest the title thereto in the latter, but merely gives him a right to use the same in his own business without compensation, the title, as to all others, being still in the employe. Thus, in *Eustis Mfg. Co. v. Eustis*, 51 N. J. Eq. 565, an action to compel the performance of a contract to assign certain patents to the plaintiff company, where it appeared that the inventions for which the patents in question were granted were developed while the defendant was in the plaintiff's employ, that the experiments and work in making models were

done at the company's factory, and that the patents were taken out by the company's counsel, and at its expense, it was held that the company was entitled to an irrevocable exclusive license for the use of the patent, to cease on the dissolution of the company. If, however, none of the employer's time or materials were used in making the invention, the employee's title to it is absolute; and the employer can claim neither the patent nor a license to use the invention: *Matthews & Willard Mfg. Co. v. Trenton Lamp Co.*, 73 Fed. Rep. 212; *Ft. Wayne, C. & L. R. Co. v. Haberkorn*, (Ind.) 44 N. E. Rep. 322; and the mere use of an invention made by an employee, by way of experiment, will not vest in the employer a right to continue to use it, or be equivalent to a transfer of the invention: *Niagara Radiator Co. v. Meyers*, 40 N. Y. Suppl. 572. But if the employee, after patenting an invention to which the employer has no legal or equitable claim, permits the latter to use it without compensation, though without an express license, a license so to use it will be implied, and will be extended to a corporation organized to continue the employer's business: *Lane & Bodley Co. v. Locke*, 150 U. S. 193; *Keyes v. Min. Co.*, 158 U. S. 150; see *McAleer v. United States*, 150 U. S. 424.

An employee may take out a patent for an invention made by him, irrespective of the rights of his employer, whether a private individual or the government: *Matthews & Willard Mfg. Co. v. Trenton Lamp Co.*, 73 Fed. Rep. 212; but this is expressly forbidden by law, in the case of an employee of the Patent Office: Rev. Stat. U. S. § 480. This statute, however, merely forbids the taking out of a patent while the inventor is employed in the Patent Office; and on leaving it he may patent an invention, whether made before, during or after his employment there: *Foote v. Frost*, 14 O. G. 860; *Page v. Holmes Burglar Alarm Tel. Co.*, 1 Fed. Rep. 304.

Patents—Contributory Infringement.**THOMSON-HOUSTON ELECTRIC CO. v. KELSEY
ELECTRIC RAILWAY SPECIALTY CO. ET AL.**

(Circuit Court of Appeals, Second Circuit. July 29, 1896.)

(75 Fed. Rep. 1005. Modifying 72 Fed. Rep. 1016.)

An injunction on the ground of contributory infringement may be granted against one who, by his advertisements and course of business, shows a willingness to co-operate with an infringer who may present himself, by making and selling to him a device or element of a patented combination, to be used in connection with other parts, obtained from a different source. WALLACE, Circuit Judge, dissenting.

It is not an infringement on the Van Depoele patent, No. 495,443, for an improvement in traveling contacts for electric railways, to furnish to a user of the invention a trolley stand, which is one of the elements of the combination, to replace the original stand, which has become broken, or has otherwise lost its useful capacity.

One who purchases the apparatus covered by the Van Depoele patent, No. 495,443, for an improvement in traveling contacts for electric railways, has the right, immediately hereafter, to discard the element known as the "trolley stand," and purchase from another a different stand, which he conceives to be better suited to his purposes.

Appeal from the Circuit Court of the United States for the District of Connecticut.

This was a suit in equity by the Thomson-Houston Electric Company against the Kelsey Electric Railway Specialty Company and others for alleged infringement of the Van Depoele patent for an improvement in traveling contacts for electric railways. A preliminary injunction was granted by the court below, (72 Fed. Rep. 1016,) and the defendants have appealed.

Edward H. Rogers, for appellants.

Betts, Hyde & Betts, for appellee.

Before WALLACE, LACOMBE and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge.—The circuit court of the United States for the district of Connecticut, after an exhaustive investigation of the validity and alleged infringement of letters patent No. 495,443, dated April 11, 1893, and issued to the administrators of Charles J. Van Depoele, decreed that the Winchester Avenue Railroad Company had infringed claims 6, 7, 8, 12 and 16 of the patent. The complainant in the suit was the Thomson-Houston Electric Company, the assignee of the patentees : 71 Fed. Rep. 192. The combination covered by these claims, and now used generally by the electric railroads of the country, consisted “generally in an electric railway having an overhead conductor, and a car for said railway, provided with a contact device carried by the car so as to form a unitary structure therewith, and consisting of a trailing arm, hinged and pivoted to the car so as to bridge the space between it and the conductor, and move freely both laterally and vertically, and said arm carrying at its outer end a contact device capable of being pressed upward, by a suitable tension device, into engagement with the under side of the conductor.” The important and distinctive part of the invention was the trailing arm, hinged and pivoted to the car, and moving laterally and vertically, with a contact device at its outer end, capable of being pressed upward, by a suitable tension device, into engagement with the under side of the conductor. The novel element of “the overhead, underrunning, spring-pressed, laterally swinging contact arm” was of great utility, and has superseded pre-existing attempts at trolley-road equipment. The “trolley stand,” so called, is the means by which the trailing arm is hinged and pivoted to the car with a capacity for lateral and vertical movement, and is pressed upward by some suitable spring. No particular form of stand was included in the Van Depoele invention, for any one of a number of forms would answer the purpose. The defendant, the Kelsey Electric Railway Specialty Company, manufactures a particular form of trol-

ley stand, for which letters patent have been issued, which it has advertised for sale, and has also, in its advertisement, represented itself as a dealer in trolley poles and overhead trolley equipments. Its trolley stand consists, in the main, of a base secured to the car roof, a frame revolvably mounted upon the base so as to receive the end of a trolley arm, and springs by which tension upon the arm is produced. The Thomson-Houston Electric Company having brought suit against the Kelsey Company for infringement of this Van Depoele patent, the circuit court for the district of Connecticut (72 Fed. Rep. 1016,) granted a motion for an injunction *pendente lite* against its making or selling any apparatus embodying the subject-matter of any trolley bases devised or intended to be used in infringement of those claims of said patent which were found to have been infringed in the Winchester case. The present appeal is from this order.

The question, as presented in the affidavits and briefs, relates particularly to the manufacture and sale of trolley stands. As evidence of an intention to infringe, the complainant relied upon the language of the defendant's advertisement, which offered for sale the stands and overhead equipment generally. The defendant admits that it has sold trolley stands, directly or indirectly, to electric companies which purchased their equipment originally from the complainant's licensees, either by way of repair, or because the purchasers wanted an improved stand. It denies that it has knowingly sold to an infringer of the patent in suit, or to be used for the purpose of infringement. The circuit judge was of opinion that the defendant was selling stands capable of, and designed for, an unlawful use, and that, inasmuch as they are useful only for the purpose of performing functions involved in the operation of the patent, there was a presumption of an intention that these stands should be so used, which was not dispelled by the affidavits. The question being one of contributory infringement, the appellant urges that there was no sufficient evidence

that the defendant had concerted, or was concerting, or intended to concert with any person for the infringement of the complainant's patent, and that, consequently, the injunction order either ought not to have been issued, or was too sweeping in its terms.

What contributory infringement is, and why it should be enjoined, was clearly shown in *Wallace v. Holmes*, 9 Blatchf. (U. S.) 65, Fed. Cas. No. 17,100—the earliest case in this country upon the subject, and upon which the subsequent cases of contributory infringement rest. The complainant's patent in that case was for an improved lamp, which consisted of an improved burner, or metallic portion, and a glass chimney. The defendant made and sold the improved burner, which must be used with a chimney, and, in order to make sales, exhibited the burners with chimneys to customers; and the circuit judge thought that a concert with others to use the patented article as a whole, was a certain inference from the obvious facts in the case, and the efforts of the defendant to solicit sales by showing the operation of the whole patented article. The willingness of the defendant in this case to aid other persons in any attempts which they may be disposed to make towards infringement is also apparent. Its trolley stands are designed to be used in the patented system, and to be the means of enabling the trailing pole to perform its distinctive and novel part in the combination. It sufficiently appears from the defendant's advertisements and affidavits that it was ready to sell to any and all purchasers, irrespective of their character as infringers. A proposed concert of action with infringers, if they presented themselves, is fairly to be inferred from the obvious facts of the case; and an injunction order is the proper remedy against wrongful acts which are proposed, or are justly to be anticipated. But the defendant says, also, that the order which was granted is capable of too sweeping an interpretation, because it has a right to supply purchasers, who have at-

quired the right to use the patented combination, with its trolley stands, either by way of repair, or because the stands which were furnished to them were not adapted to the needs of the cars upon which they were placed; and it invokes the principle which was stated in *Chaffee v. Belting Co.*, 22 How. 217, as follows:

“If a person legally acquires a title to that which is the subject of letters patent, he may continue to use it until it is worn out, or he may repair it or improve upon it as he pleases, in the same manner as if dealing with property of any other kind.”

The complainant, which is utilizing its patent rights by the manufacture and sale of trolley-railroad equipments, and desires to compel purchasers to continue to supply themselves with its form of stands, replies that the defendant's sales are not for the purpose of repair, but are for the reconstruction of the patented combination, and that a reconstruction of a destroyed or worn-out combination is an infringement. This proposition is true, and examples of the cases to which it is applicable are found in *Cotton-Tie Co. v. Simmons*, 106 U. S. 89, 1 Sup. Ct. Rep. 52, and *Davis Electrical Works v. Edison Electric Light Co.*, 8 C. C. A. 615, 60 Fed. Rep. 276. In the *Cotton-Tie* case the continual use of patented ties, which consist of a band and buckle, was purposely destroyed by the purchaser, by cutting the band, after he had received the bale around which the tie was placed, and the parts were sold as waste material. A new purchaser bought the several parts, mended the bands, replaced the buckles, sold them to be used as ties, and was held to be an infringer. In the *Edison* case the reconstruction was equally extensive. The infringer made a hole in the bulb of an Edison incandescent electric lamp, in which the carbon filament had been worn out, put in a new filament, having its ends cemented in platinum sleeves, fused a tube of glass into the open end of the bulb, exhausted the air and sealed the bulb. Inasmuch as “the filament,

duly charged, is the light-giving thing," the work of the infringer was the manufacture of a new lamp. The complainant, recognizing that the facts in these cases are not analogous to those in the record now before us, urges that, in order to constitute reconstruction of a patented device, it is not necessary that the structure should have been destroyed intentionally, or that the vital and peculiar element of the invention should have been worn out by use, but that the substitution of an important member of a patented combination, which was intended to be permanent, in place of the corresponding member, which had been accidentally broken or has been worn out, is reconstruction, and that there is a recognized distinction between such a substitution, and the replacing of fragile members, whose life is necessarily short. Reliance is placed upon the case of *Wilson v. Simpson*, 9 How. 109, which involved the question of the interest which the owners of a patented machine had in it after the expiration of the first term of a patent, where there had been a renewal and extension of it, and which had been sometimes supposed to establish the rule that the replacement by the purchaser of the parts of a patented machine, which must, from their nature, be temporary, is permissible, while in no event is the replacement permissible of a part which it was hoped would be permanent. The case related to the right of a purchaser of a Woodworth planing machine to replace cutters, which ordinarily had a life of only sixty or ninety days, and, as a necessity, the opinion dwells upon that fact; but the decision did not make it a *sine qua non*, and did not intend to say that temporary cutters can be replaced, and that an element intended to be permanent, but accidentally broken in thirty days after it was purchased, cannot be replaced. The distinction which the court was endeavoring to point out, and which it thought was well illustrated in the Woodworth planer, was the difference between the repair or replacement of a single element of a combination, and the

manufacture of a new machine in place of one which had become useless. The court says :

“ We admit—for such is the rule in *Wilson v. Rousseau*, 4 How. 646—that when the material of the combination ceases to exist, in whatever way that may occur, the right to renew it depends upon the right to make the invention. If the right to make does not exist, there is no right to rebuild the combination. But it does not follow, when one of the elements of the combination has become so much worn as to be inoperative, or has been broken, that the machine no longer exists, for restoration to its original use by the owner who has bought its use. When the wearing or injury is partial, then repair is restoration, and not reconstruction. Illustrations of this will occur to any one, from the frequent repairs of many machines for agricultural purposes, also from the repair and replacement of broken or worn-out parts of larger and more complex combinations for manufactures. In either case, repairing partial injuries, whether they occur from accident, or from wear and tear, is only refitting a machine for use. And it is no more than that, though it shall be a replacement of an essential part of a combination. It is the use of the whole of that which a purchaser buys, when the patentee sells to him a machine; and, when he repairs the damages which may be done to it, it is no more than the exercise of that right of care which every one may use to give duration to that which he owns, or has a right to use as a whole.”

This distinction is both natural, and founded upon right reason, and gives to the patentee all the benefits to which he is entitled by the grant of the patent. While it is not intended that a trolley stand should be broken, or should lose its useful capacity, either calamity may befall it; and the right to replace the injured part by a new stand, from any person who can supply the article, should be conceded by the owners of the patent. It is not intended to permit the unauthorized substitution of the vital and distinctively

new part of an invention in place of one worn out by use, as the substitution of a new filament in an Edison incandescent lamp, or the substitution of a new for an old burner in the Wallace case, *supra*; but the trolley stand is not the vital element of the invention, though a portion of it is an element of the combination. It is the means, and in most cases the non-patented means, for there are numerous forms of these bases by which the pole is permitted to perform its functions.

The defendant also says that, in order to obtain the use of an improved trolley stand, purchasers from the complainant are sometimes willing to discard its stands, and substitute another form, which had its own advantages. For example, the trolley stand which is sold by the defendant is said to be less elevated above the top of the car than the stand of the complainant, and therefore it is said that the Norwalk Street Railway Company found it necessary to change the stands which were furnished by the complainant, because of the low bridges recently constructed by a steam railroad over the tracks of the street electric road. A refusal to permit such a substitution is equivalent to a declaration that the street railway company cannot be permitted to improve its stands, except by the consent of the complainant. If a purchaser from the complainant chooses, the day after his purchase, to substitute a stand which is better made, and better adapted to his peculiar needs, he has the right to do so. But it will be urged that such a permission opens the door to infringement, and permits a spoliation of conceded rights of the complainant. It does throw upon the defendant the duty of careful investigation into the objects of the purchasers of its stands, and of an abandonment of indifference as to whether they are seeking to trench upon the rights of the owners of the patent, or else, a liability to suffer the consequences of a violation of the injunction order.

The order is directed to be modified, without costs of this

court, by adding the words: "It is not intended to enjoin the defendant against the sale of trolley stands by way of replacement of broken stands, or stands worn by use, or substitution for trolley stands previously sold by the complainant to purchasers from it, but this permission does not give authority to reconstruct or rebuild a combination which has been sold by the complainant."

WALLACE, Circuit Judge (dissenting.)—This case presents in my view an utterly unwarranted attempt on the part of the complainant to enlarge the monopoly which it has acquired as the owner of the patents in suit, and to dominate exclusively the manufacture and sale of articles which its patents do not cover, and which others have a legal and moral right to make and sell. The preliminary injunction by which the defendants are restrained from making or vending their trolley stands was granted without a particle of evidence that they had ever infringed any of the claims of the complainant's patents, and, as I think, without the slightest evidence that they threaten to do so. They are as much entitled to make and sell their trolley stands as they are to make and sell the rails, the poles, the wires, the screws, the paint, or any other article which may be required for use by those who own and operate electric railways in which the improvements covered by the patents of the complainant are utilized. The country is crowded with electric railways which utilize these improvements, but the improvements do not consist in the trolley stand. They consist in various combinations of parts, of which a trolley stand, in some form, is one. These railways are generally owned and operated by corporations, a great number of which buy their outfit from the complainant, and thereby acquire the right to use the patented combinations during the life of the organized parts. Concededly, they have a right to repair their trolley stands, to substitute new ones for those old or worn out, or to substitute a better and im-

proved kind for those originally bought of the complainant. The defendants have an equal right to make and sell the stands to such owners for that purpose.

The injunction was granted upon the theory that a case of contributory infringement had been shown. The only evidence of contributory infringement consists in the fact that the defendants are making, advertising and selling their trolley stands to the public. That they are concerting with infringers, with a view to assist them in appropriating without compensation the inventions patented by the complainant, there is not a particle of evidence. Being entitled to sell their article, they are under no obligation, before selling it, to inquire whether the purchaser intends to make an illegal use of it. Privity with a wrongdoer is not to be inferred from the exercise of a legal right. The man who sells a gun or a knife would be guilty of an impertinence if he should inquire of the purchaser whether he intends to use it legitimately, and is under no duty to do so. The same rule applies to one who makes or sells an article which is not patented, but which may be used by the purchaser to work an infringement of a patent if he so chooses. One who assists another to infringe a patent is, of course, a tort-feasor; and whether he is called a contributory infringer, or merely an infringer, is only a matter of nomenclature. But he does not assist or concert with another to infringe merely because he sells him an article which may be used to effect an infringement. In other words, participation in a wrong is not established by doing a lawful act, without evidence of an unlawful intention.

I think the order granting the preliminary injunction should be reversed.

CONTRIBUTORY INFRINGEMENT OF PATENT.

When a structure consisting of several parts is patented as a combination, one who manufactures and sells some of the parts, which are useless without the others, with the understanding

and intent that the other parts shall be supplied by another person, and the whole be put into use in its complete form, is liable as an infringer of the patent, in spite of the well-settled rule that when a patent is for a combination merely, it will not be infringed by one who uses one or more of the parts, but not all, to produce the same results, either by themselves or by the aid of other devices: *Turrell v. Spaeth*, 8 O. G. 986; *Richardson v. Noyes*, 10 O. G. 507; *Schneider v. Pountney*, 21 Fed. Rep. 399; *Travers v. Beyer*, 26 Fed. Rep. 450; *Cotton Tie Co. v. Simmons*, 106 U. S. 89; *Renwick v. Pond*, 5 Fish. Pat. Cas. 569; *Lee v. Northwestern Stove Repair Co.*, 50 Fed. Rep. 202; *Boyd v. Cherry*, 4 McCrary, (U. S.) 70; *Thomson-Houston Electric Co. v. Ohio Brass Co.*, 78 Fed. Rep. 139. The same rule applies to the sale of a compound which the seller knows cannot be practically applied without making the user an infringer: *Bowker v. Dows*, 3 Ban. & Ard. Pat. Cas. 518; *Rumford Chem. Works v. Hecker*, 10 O. G. 289; *Alabastine Co. v. Payne*, 27 Fed. Rep. 559; see *Geis v. Kimber*, 36 Fed. Rep. 105. The leading case on this subject is *Wallace v. Holmes*, 9 Blatchf. (U. S.) 65, where a burner for a lamp, made by defendant, with the design that it should be used in combination with a chimney made by a third party, was held to infringe the plaintiff's patent for burner and chimney combined, *WOODRUFF, J.*, saying, (p. 75:)
"If, in actual concert with a third party, with a view to the actual production of the patented improvement in lamps, and the sale and use thereof, they consented to manufacture the burner, and such other party to make the chimney, and, in such concert, they actually make and sell the burner and he the chimney, each utterly useless without the other, and each intended to be used, and actually sold to be used, with the other, it cannot be doubtful, that they must be deemed to be joint infringers of the complainants' patents. It cannot be that, where a useful machine is patented as a combination of parts, two or more can engage in its construction and sale, and protect themselves by showing that, though united in an effort to produce the same machine and sell it, and bring it into extensive use, each makes and sells one part only, which is useless without the others, and still another person, in precise conformity with the purpose in view, puts them together for use. If it were so,

such patents would, indeed, be of little value. In such case, all are tort-feasors, engaged in a common purpose to infringe the patent, and actually, by their concerted action, producing that result." But the mere fact that the parts so manufactured are capable of being used for such a purpose is not sufficient; it must be proved that they are intended to be so used, or that they cannot be used otherwise: *Barnes v. Straus*, 9 Blatchf. (U. S.) 553; *Saxe v. Hammond*, 1 Holmes, (U. S.) 456; *Snyder v. Bunnell*, 38 O. G. 1130; *Keystone Bridge Co. v. Phoenix Iron Co.*, 5 Fish. Pat. Cas. 468; *Maynard v. Pawling*, 3 Fed. Rep. 711; *Campbell v. Kavanaugh*, 20 Blatchf. (U. S.) 256; and if the parts are made to be sold and used without the others, there is no infringement: *Coolidge v. McCone*, 2 Sawy. (U. S.) 571. So, the mere fact that a person sells an article to which a patented device can be attached does not make him an infringer, provided the article is not so constructed that the patented device and no other can be used with it: *Bliss v. Merrill*, 42 O. G. 97; and it is no infringement to sell, for the purpose of repairing a machine, a part which is peculiarly liable to be broken or worn out; though it would be such if the repairs amounted to a reconstruction: *Shickle, Harrison & Howard Iron Co. v. St. Louis Car Coupler Co.*, 77 Fed Rep. 739.

Pledge—Bill to Redeem—Transfer by Pledgee—Bona Fide Purchaser—Estoppel.

NELSON ET AL. v. OWEN.

(Supreme Court of Alabama. December 17, 1896.)

(21 So. Rep. 75.)

When a pledgee has transferred the pledged property, and is insolvent, and the transferee resides in another state, a bill in equity will lie by the pledgor to redeem.

A bill by a pledgor to redeem pledged property which has been transferred by the pledgee is not demurrable because it does not allege that the transferee had notice of complainant's rights, when it does not

show in what manner or on what consideration he acquired possession ; the defence of *bona fide* purchaser being one to be made by plea or answer.

The holder of a certificate of stock in a corporation, who signs a blank form of assignment thereon, expressing consideration, and including an irrevocable power of attorney authorizing a transfer of the stock on the books of the company, and delivers the certificate as collateral, is estopped to assert title thereto as against a *bona fide* purchaser from the pledgee.

Appeal from Chancery Court, Jefferson county ; THOMAS COBBS, Chancellor.

Bill in equity by Charles N. Owen against William Nelson and others, executors of Charles Nelson, deceased, and others. Decree for complainant, and the executors appeal. Reversed.

The bill was filed on March 3, 1894, to recover title to forty-eight shares of stock in the North Birmingham Land Company, represented by certificate A296, from appellants, William Nelson and others, executors, or, in lieu thereof, to have another certificate issued to complainant by said company. The bill alleges that said certificate was in the name of said C. N. Owen, and was delivered to W. E. Berry, indorsed in blank, to secure a loan of \$600, and a further loan of \$200, obtained thereafter, each evidenced by promissory notes of Owen to Berry ; that said Berry, before the maturity of the debt, separated the collateral from the debt, and transferred and delivered said certificate to B. F. Perkins, and B. F. Perkins thereafter transferred said certificate to Charles Nelson, as collateral security for a debt due by Perkins to Nelson ; that Nelson had since died, and that William Nelson, J. H. Brengleman and the Nashville Trust Company were the executors of his last will and testament ; that said Owens had paid up the entire debt due said Berry, and made demand on said Berry for said stock, and also made demand on the North Birmingham Land Company for the issuance of a new certificate in lieu of the original one ; that said Berry is insolvent. Berry, Perkins, the North

Birmingham Land Company and the executors of Charles Nelson, deceased, were parties defendant to the bill. The prayer of the bill was that the complainant be decreed to have a full and complete legal title to the said forty-eight shares of stock, and that the certificate for said stock so pledged by him be required to be delivered up with proper transfers on the same, or, in lieu thereof, that another certificate be issued to him by said corporation, and for general relief. There were several demurrers interposed to the bill, the grounds of which are sufficiently stated in the first paragraph of the opinion. The demurrers were overruled, and decree *pro confesso* entered against all the defendants except the executors of Charles Nelson, deceased. The answers of the executors, in effect, deny that the transfer to Perkins and Nelson was made without the consent of said Berry, and also set up that by reason of said certificate of stock being indorsed for value in blank by said Owen, and all the rights of ownership thereby conferred on the holder thereof by Owen, and the said Charles Nelson becoming the transferee for value, without notice of any right of complainant or infirmity in the title of said Owen, said Owen was estopped to deny the right of Berry and Perkins to dispose of said stock as their own. The other facts of the case are sufficiently stated in the opinion. On the final submission of the cause on the pleadings and proof, the chancellor decreed that the complainant was entitled to the relief prayed for, and ordered accordingly.

Mountjoy & Tomlinson and *Garrett & Underwood*, for appellants.

Houghton & Collier, for appellee.

BRICKELL, C. J.—Three of the causes of demurrer to the bill are founded on the ground that, for the conversion of the stock, the complainant had an adequate remedy at law. The essence of the remaining causes

is that the bill should, by proper averments, have negatived the right and equity of Perkins and of Nelson to protection as *bona fide* purchasers of the stock. When a pledgee, by an unauthorized sale or other unauthorized disposition, converts the pledge, the pledgor, upon paying or tendering payment of the debt, may maintain trover for the conversion, and this remedy is generally deemed adequate, excluding all necessity for the interference of a court of equity: Jones, Pledges, §§ 556 *et seq.* Exceptional cases may occur in which this remedy is inadequate, and a court of equity will intervene for the protection and relief of the pledgor. It is said by Judge STORY: "Generally speaking, a bill in equity to redeem will not lie on the behalf of the pledgor or his representative, as his remedy, upon a tender, is at law. But if any special ground is shown, as if an account or a discovery is wanted, or there has been an assignment of the pledge, a bill will lie:" 2 Story, Eq. Jur. § 1032. And in Jones, Pledges, § 557, it is said: "A bill in equity may be maintained to redeem a pledge, if an account is wanted, or if there has been an assignment of the pledge, notwithstanding the pledgor has a remedy at law, in an action of trover." With much of closeness this court has adhered to the doctrine that where rights are legal, and courts of law may proceed to a judgment which will afford complete justice and full protection to the parties, courts of equity will not intervene. When, however, there is in the particular case something exceptional, some peculiar fact or circumstance, rendering the remedy at law inadequate, equity will intervene, that complete justice may be done, and full protection afforded to the parties. Whether adherence to this doctrine would require that a court of equity should decline jurisdiction to compel specific delivery of a pledge, on the ground that a relation of trust and confidence exists between pledgor and pledgee, it is not now necessary to consider. The facts of this case, as alleged in the bill—and to them our decision must be limited—are ex-

ceptional, and furnish special ground for the interference of a court of equity. The pledgee, Berry, is insolvent, and the insolvency renders unavailing a recovery of damages at law against him for the conversion of the stock. The personal representatives of Nelson, who have succeeded to the possession of the certificate of stock, reside without the state, and, as against them, ordinary legal remedies cannot be pursued. These concurring facts present a case in which a court of equity may and ought to intervene for the relief of the pledgor, compelling a restoration of the certificate of stock, which, in the hands of strangers, casts a cloud on his title, and may involve him in litigation with the corporation: *Hasbrouck v. Vandervoort*, 4 Sandf. (N. Y.) 74; *White Mts. R. R. v. Bay State Iron Co.*, 50 N. H. 57; *Pollak v. Janney*, 100 Ala. 561, 13 So. Rep. 661. If it appeared clearly on the face of the bill that Nelson acquired the stock in good faith, and for a valuable consideration, without notice of the right the complainant asserts, it may be, a demurrer would be entertained; or if it appeared that Nelson acquired the stock upon a fair and valuable consideration, in the usual course of business, the want of averment that he had notice of the right of the complainant, it may be, would render the bill demurrable: *Story Eq. Pl. § 603*; 2 *White & T. Lead. Cas. Eq. pt. 1*, p. 24; *Lewis v. Mohr*, 97 Ala. 366, 11 So. Rep. 765. But the bill is without these averments. It is silent as to the consideration upon which Nelson acquired the stock, or the manner of acquisition. The defence of a *bona fide* purchaser, in this state of case, can be made available only by plea or by answer; and, whether made in the one mode or the other, it is essential that notice, though not averred in the bill, be denied: 2 *White & T. Lead. Cas. Eq. pt. 1*, p. 25; *Moore v. Clay*, 7 Ala. 742; *Johnson v. Toulmin*, 18 Ala. 50; *De Vendal v. Malone's Exrs.*, 25 Ala. 272. There was no error in overruling the demurrer and the motion to dismiss the bill for want of equity.

The questions on which the real merits of the controversy depend are of great practical importance to the owners of shares of stock in corporations, and to all who deal in them, either as purchasers, or in the acceptance of them as security for the payment of debts. In view of the prevailing current of authority, these questions are not of difficult solution, and do not require extended discussion. Briefly stated, the material, controlling facts are that Owen was the owner of forty-eight shares of the capital stock of the North Birmingham Land Company, a corporation organized and existing under the laws of this state, having its domicile in the city of Birmingham. The company had issued to Owen a certificate, in the customary form of such certificates, of ownership of the stock. On the 4th day of October, 1890, he borrowed \$500 from, or through the agency of, one Berry, a broker doing business in Birmingham, making his promissory note for the payment thereof at ninety days, pledging the certificate of stock as collateral security. On the back of the certificate was the form of an assignment or transfer, expressed to be made in consideration of value received, including an irrevocable power of attorney, authorizing a transfer to be made on the books of the company. As to date, the name of the assignee or transferee, and of the attorney, the form was in blank. At the time of the delivery of the certificate to Berry, Owen signed, or had previously signed, this form, and his signature was attested by a subscribing witness. Subsequently—it does not clearly appear upon what consideration, or for what purpose—Berry delivered the certificate to one Perkins, by whom, with the assent of Berry, it was pledged to the Birmingham National Bank to secure payment of \$1,000 presently loaned. Perkins was indebted, in a sum of money exceeding \$1,200, to Charles Nelson, of Nashville, Tennessee, and one Brengleman was the agent for the collection or securing payment of the debt. In the course of an interview with Brengleman Perkins said he was without ready money, but had this

certificate of stock in pledge to the Birmingham National Bank. The result of the interview was an agreement that Brengleman should pay the debt to the bank, redeeming the stock, and extend the time of payment of the debt due Nelson, taking the certificate of stock as collateral security for the payment of the original debt, and for the money advanced to the bank. The money was paid to the bank, and nine notes, maturing at different times in the future, for the payment of the aggregate indebtedness, were taken, and the certificate of stock delivered to Brengleman as collateral security for their payment. Owen paid the debt to Berry for which he originally pledged the stock, and several times demanded of him the return of the certificate. There is no evidence that the national bank or Brengleman or Nelson had any notice or knowledge of the transaction between Owen and Berry, or that Owen had not parted with title to the stock, absolutely and unconditionally.

The shares constituting the stock of a corporation are now regarded by the common law, whether the property owned by the corporation is real or personal, as personal property, capable of alienation or succession in any of the modes by which that species of property may be transferred or transmitted. Strictly speaking, they are not chattels, but are rather choses in action, "or, in other words, they are merely evidence of property:" *Ang. & A. Corp.* §§ 557-560; *1 Cook, Stock, Stockh. & Corp. Law*, § 12; *1 Thomp. Corp.* §§ 1066-1070. Statutes may, and not infrequently do, declare them personal property; but if a larger legislative intent is not apparent, such statutes are construed as merely declaratory of the known rule of the common law. As evidence of ownership—as a muniment of title—corporations are accustomed to issue certificates to the shareholders. The certificate is but "the written acknowledgement by the corporation of the interest of the shareholder in the corporate property and franchises. It operates to transfer nothing from the corporation to the shareholder, but merely affords

to the latter evidence of his rights:" 1 Cook, Stock, Stockh. & Corp. Law, § 14. Upon principle and authority, it is manifest, the certificate has not in it the elements and characteristics of negotiable or commercial paper. It is not evidence of debt. It is not a promise to pay, nor an order for the payment of money. It is but a muniment of title. While this is true, a species of negotiability, or to employ the usual phrase, sufficiently expressive for all practical purposes, a *quasi* negotiability, attaches to it, adding to its value. And if the owner, in any form, clothes another with the apparent title and the consequent power of disposition, inducing third persons to deal with him as owner, such persons are entitled to full protection—to the same measure of protection extended to the *bona fide* taker of negotiable or commercial paper: 2 Thomp. Corp. §§ 2589 *et seq.*; 1 Cook, Stock, Stockh. & Corp. Law, §§ 411–416; Jones, Pledges, §§ 134, 136, 466; Colebrooke, Collat. Sec. §§ 437–439. The judicial decisions supporting this doctrine, now of general recognition in this country, are referred to in these authorities, and a citation of them is not necessary. In *McNeil v. Bank*, 46 N. Y. 325, (which, we may remark, is not distinguishable from the case before us,) it was said: "It must be conceded that, as a general rule applicable to property other than negotiable securities, the vendor or pledgor can convey no greater right or title than he has. But this is a truism predicable of a simple transfer from one party to another where no other element intervenes. It does not interfere with the established principle that where the true owner holds out another, or allows him to appear, as the owner of, or as having full power of disposition over, the property, and innocent third parties are thus led into dealing with him as apparent owner, they will be protected. Their rights in such cases do not depend on the actual title or authority of the party with whom they deal directly, but are derived from the act of the real owner, which precludes him from disputing, as against them, the existence of the

title or power which, through negligence or mistaken confidence, he caused or allowed to appear to be vested in the party making the conveyance." The doctrine was recognized in *Land Co. v. Dennis*, 85 Ala. 565, 5 So. Rep. 317.

Voluntarily, Owen delivered the certificate to Berry, accompanied by a transfer and an irrevocable power of attorney, authorizing transfers on the books of the company. The transfer, in the particulars which have been mentioned, was in blank, and doubtless purposely left in blank to facilitate the use of the certificate. The presence of the blanks imported authority to fill them by any holder of the certificate desiring a transfer on the books of the company. It is rather difficult, on the facts of the case, to resist the conclusion that a transfer of the certificate by Berry was contemplated. However that may be, Owen is estopped from a denial of Berry's ownership of the stock, and authority to dispose of it by sale or pledge, as against third persons succeeding to the possession of the certificate, dealing in good faith and for value. If Berry has betrayed trust and confidence reposed in him, and loss or injury results, Owen had full opportunity to protect himself by a declaration in the transfer of the purposes for which it was made. Not having taken care to protect himself, not expressing in the writing the real character of the transaction between him and Berry as he now asserts it to have been, there is nothing of right or justice in the effort to visit loss on strangers who trusted to the truth of the writing, and all that it naturally and logically imports. A *bona fide* purchaser, entitled to protection against the prior right of the pledgor, is one who gives value, or yields up an existing right, or changes his condition for the worse, trusting to the apparent ownership the pledgor has created: *Mobile L. Ins. Co. v. Randall*, 71 Ala. 220. It is not contended that the Birmingham National Bank and Nelson were not purchasers of the stock upon a fair and valuable consideration, in the ordinary, usual

course of business, without notice of the transaction between Owen and Berry, or that there was any infirmity in the apparent title to the stock. The taking of certificates of corporate stock in payment, or as collateral security for the payment, of debts, is a frequent business transaction. The bank loaned money, taking the certificate as collateral security. The loan and pledge were contemporaneous and concurrent. Nelson redeemed it from the bank, and, in consideration of its pledge to him, gave time for the payment of the money advanced in redemption, and of the antecedent debt due him. The bank gave value in the loan of the money. Nelson gave value in advancing the money to redeem the stock, in yielding up his existing right to demand payment of the debt due him, and in extending the day of payment of the aggregate indebtedness. Each is entitled to protection as a *bona fide* purchaser. These transactions were had with the apparent owner, having the muniment of title, and every visible *indicia* of ownership of which the stock was capable. Without opening the way for fraud and dishonesty, transactions of this character cannot be undone at the instance of a party who by his own conduct induces them.

We do not perceive the force of the contention that § 1784 of the Code infringes upon or abrogates the general rule of law estopping the pledgor from asserting title against a purchaser from or the pledgee of the apparent owner. The section forms part of a chapter of the Code devoted to "Collateral Securities—Pledges," and must be read and construed in connection with the other sections constituting the chapter. The primary intent of the chapter is to define and declare the rights and duties of pledgor and pledgee—of the giver and taker of collateral security—as between themselves. There is no purpose manifested to define the intervening rights of third persons dealing with either. It may be conceded that, under the influence of this section, when Berry parted with the stock, separat-

ing it from the debt, Owen, without payment or tender of payment of the debt, could have maintained trover against him for a conversion of the stock, or could have maintained the like action against one taking the stock with notice of the pledge. This question is not before us, and we need not, and do not, decide it. The question now presented is essentially different, and readily distinguishable. The separation of the pledge and debt was in exercise of the dominion, the apparent ownership with which Owen clothed Berry, as was the disposition of the pledge by Berry. The title *bona fide* purchasers have acquired, relying upon the apparent ownership with which Berry was clothed, is the title Owen is estopped from denying. By no act of Berry's or of Owen's could the estoppel be removed, or the rights of such purchasers be affected. General as may be the words of the statute, they must be read and construed in the light of the common law, and must not be regarded as infringing upon its rules and principles, save so far as may be expressed, or fairly implied to give them full operation: *Scaife v. Stovall*, 67 Ala. 237. Discussing a question not wholly dissimilar, it was said in *Shaw v. Railroad Co.*, 101 U. S. 565: "No statute is to be construed as altering the common law further than its terms import. It is not to be construed as making any innovation upon the common law which it does not fairly express." A construction of the statute as operating an abrogation of the salutary, conservative principle of the common law, estopping, as against *bona fide* purchasers, the owner of personal property, who has parted with all the *indicia* of ownership, clothing another with it, enabling him to deal with it as owner, would be repugnant to all known rules of statutory construction. It is quite an error to suppose there is anything said or decided in *Pollak v. Janney*, 100 Ala. 561, 13 So. Rep. 661, contrary to this view. Judicial decisions must be read in the light of the facts on which they are based, and in that case the court was passing on the rights of the

parties to the original transaction. The rights of third persons dealing in good faith with either of the parties were not involved, and in reference to them there was no expression of opinion.

It is scarcely necessary, but from abundant caution it may be proper, to say, that the case does not involve the right of the true owner to reclaim, or to recover damages for the conversion of, a certificate of stock which, without laches on his part, he may have lost, or which may have been stolen from him. That question was considered and decided in *Land Co. v. Dennis*, 85 Ala. 565, 5 So. Rep. 317. In such cases the true owner does not voluntarily and intentionally clothe another with the *indicia* of ownership and the power of disposition, inducing dealings with him as if he were the real owner.

The decree of the chancellor is not in accord with the view we have expressed, and it must be reversed, and a decree rendered dismissing the bill. The appellee must pay the costs in this court and in the court of chancery.

REDEMPTION OF PLEDGE IN EQUITY.

1. **Equitable Ground for Relief must exist.**—When the pledgor wishes to redeem the pledged property, but the pledgee refuses to return it, the remedy of the former is, as a general rule, at law; and he will not be permitted to proceed by bill in equity to redeem, unless there are special circumstances which go to show that the remedy at law is inadequate: *Flowers v. Sproule*, 2 A. K. Marsh. (Ky.) 54; *Genet v. Howland*, 45 Barb. (N. Y.) 560; *Doak v. State Bank*, 6 Ired. (N. C.) 309; *Chapman v. Turner*, 1 Call, (Va.) 280. A bill to redeem personal property is in essence a suit to compel the specific performance of the contract under which the property is held, and the court will not entertain such a bill where the orator has a plain and complete remedy at law: *Angus v. Robinson*, 62 Vt. 60. This rule is too well settled to be shaken, though it has been held in Wisconsin, that since a pledge is in the nature of a trust, the

pledgor may have a bill for specific delivery of the property held in trust: *Brown v. Runals*, 14 Wis. 693. But if special reasons exist for invoking the aid of equity, the pledgor may proceed by bill; *e. g.*, when he seeks discovery, or an account: *Ryal v. Roberts*, Barnard. 38; *Kemp v. Westbrook*, 1 Ves. Sen. 278; *Jones v. Smith*, 2 Ves. Jr. 372; *Beatty v. Sylvester*, 3 Nev. 228; *White Mts. R. R. v. Bay State Iron Co.*, 50 N. H. 57; *Hasbrouck v. Vandervoort*, 4 Sandf. (N. Y.) 74; *Lewis v. Var-num*, 12 Abb. Pr. (N. Y.) 305; *Barry v. Coville*, 7 N. Y. Suppl. 36; *Manton v. Robinson*, (R. I.) 34 Atl. Rep. 148; for even if there is a remedy at law, the pledgor may proceed in equity if he desires an accounting: *Vanderzee v. Willis*, 3 Bro. C. C. 21; *Kemp v. Westbrook*, 1 Ves. Sen. 278; *White Mts. R. R. v. Bay State Iron Co.*, 50 N. H. 57; *Hart v. Ten Eyck*, 2 Johns. Ch. (N. Y.) 62. But the account on which the jurisdiction of equity to redeem a pledge is based must be one that really requires the aid of the powers of a court of equity; *i. e.*, one having a series of transactions on both sides, and not merely one item on one side and a number of set-offs on the other; and, therefore, when the claim of the pledgee consists simply of his original advances on the goods pledged, or so much of that sum as still remains unpaid, and every sum paid or to be credited in that account, as set out in the complaint, forms a proper subject of set-off in an action at law, including even any liability of the pledgee for having sold the property pledged below its market price, there is no case presented for equitable intervention on the ground of account merely: *Durant v. Einstein*, 5 Robt. (N. Y.) 423. Further, if the pledgee has wrongfully transferred the pledge to a purchaser with notice, or has rehypothecated it, the pledgor may bring a bill to redeem; for in such cases there is no remedy at law: *Simmons v. London Joint Stock Bk.*, [1891] 1 Ch. 270; *Smith v. Lee*, 77 Fed. Rep. 779; *Pollak v. Janney*, 100 Ala. 561; *Myers v. Merchants' Natl. Bk.*, 27 Abb. N. C. (N. Y.) 266.

Before equity will grant relief, however, the pledgor must pay the debt secured by the pledge, or at least tender it, and allow all proper set-offs: *Halliday v. Holgate*, 3 L. R. Exch. 299; *Bentinck v. London Joint Stock Bk.*, [1893] 2 Ch. 120; *Newton v. Fay*, 10 Allen, (Mass.) 505; *Hathaway v. Fall River*

Natl. Bk., 131 Mass. 14; *Hinckley v. Pfister*, 83 Wis. 64. So, if the pledge has been rehypothecated, it may not be redeemed without payment of the amount due the second pledgee, if he be innocent; but it may be redeemed without such payment, if he had notice of the title of his pledgor, unless the original pledgor assented to the rehypothecation: *Demainbray v. Metcalfe*, 2 Vern. 698; *Nicholson v. Hooper*, 4 My. v. Cr. 179; *Manhattan Trust Co. v. Sioux City & N. R. Co.*, 65 Fed. Rep. 559.

If the creditor sells the pledge after a bill has been filed to compel a reconveyance, thus putting it out of his power to return it, equity has jurisdiction to enter a decree for damages for conversion of the pledge: *Blood v. Erie Dime Savings & Loan Co.*, 164 Pa. 95.

2. Redemption of Corporate Stock.—When the pledgor has deposited stock of a corporation as collateral, without transferring it to the pledgee, a bill to redeem it will not lie as a general rule. But if he can assert some equitable ground for relief; *e. g.*, when he seeks an account or discovery: *Rayner v. Bryson*, 29 Md. 473; *Fowle v. Ward*, 113 Mass. 548; *Newton v. Van Dusen*, 47 Minn. 437; *Hasbrouck v. Vandervoort*, 4 Sandf. (N. Y.) 74; or when a specific performance of the contract to return it would be decreed, as when the stock possesses some peculiar value to him: *Draper v. Stone*, 71 Me. 175; *Johnson v. Brooks*, 93 N. Y. 337; he may sue in equity to redeem. Even if the stock is not transferred upon the books of the corporation, the pledgor may have specific performance of the contract for return of the stock upon payment or tender of the debt for which it was pledged, if it appears that the stock has no market or ascertainable value, that the pledgor purchased it for investment with a view to an anticipated rise in value, and that he cannot purchase other shares in the corporation, for the reason that no holder will sell them; and if there is no difference in the value of the shares, and the certificate of stock pledged has been conveyed by the pledgee to a *bona fide* purchaser for value, the court may compel the pledgee to convey stock owned by him in lieu of the certificate received from the pledgor: *Krouse v. Woodward*, 110 Cal. 638. So, when stock in a corporation has

been transferred to the name of the pledgee, so that he holds the legal as well as the equitable title, the only remedy of the pledgor, if he wishes to redeem the stock, is in equity; and a bill will lie for that purpose, though he has a common-law remedy for the conversion of the stock: *Brick v. Brick*, 98 U. S. 514; *Canfield v. Minneapolis Agricultural & Mechanical Assn.*, 14 Fed. Rep. 801; *Bryson v. Rayner*, 25 Md. 424; *Hathaway v. Fall River Natl. Bk.*, 131 Mass. 14; *Burke's Appeal*, 99 Pa. 350; *Smith v. Anderson*, 8 Tex. Civ. App. 188; see *Hayward v. National Bk.*, 96 U. S. 611; and this rule holds good *a fortiori* when the instrument by which the stock was transferred was absolute in its terms, if the transfer was really intended as merely a collateral security for a debt: *Newton v. Fay*, 10 Allen, (Mass.) 505; but the pledgee is not obliged to return the identical certificates of stock pledged; he may return other certificates corresponding to those pledged: *Thompson v. Toland*, 48 Cal. 99.

Before a bill will lie to redeem the stock, the pledgor must pay or tender the debt for which it was pledged: *Bentinck v. London Joint Stock Bk.*, [1893] 2 Ch. 120; *Bartlett v. Johnson*, 9 Allen, (Mass.) 530; *Hinckley v. Pfister*, 83 Wis. 64; and the decree should make payment a condition precedent to the return of the stock: *Smith v. Anderson*, 8 Tex. Civ. App. 188. Moreover, the tender must be sufficient. In *Dunham v. Jackson*, 6 Wend. (N. Y.) 22, the parties met for the purpose of redeeming the stock pledged, and a broker attended to receive a reassignment of the stock, and pay what should be found due to the pledgee; and after the amount was agreed upon, the broker, being requested by the agent of the pledgor to draw his check for the amount, took out of his pocket-book a blank check, for the purpose of filling it up, when he was interrupted by the pledgee, who said that it could be done the next day, and demanded that the whole value of the stock, about \$700 more than the amount liquidated, should be paid him, on the pretense that he was responsible as surety for the pledgor, on another and separate account. On a bill to redeem the stock it was held that these circumstances did not amount to a tender, and that the bare refusal of the pledgee to receive the sum due, and his demand of a larger sum, did not excuse actual tender.

Trustees—Improvement of Trust Property—Reimbursement.

DICKEL v. SMITH ET AL.

(Supreme Court of Appeals of West Virginia. April 8, 1896.)

(24 S. E. Rep. 564.)

When a trustee in good faith expends his own funds in improving the property of the *cestui que trust*, and the property is enhanced in value by such improvements to the extent of the expense thereof, the trustee is entitled to be reimbursed that expense out of the increased rents occasioned by such improvements.

Appeal from Circuit Court, Wood county.

Action by H. F. Dickel, committee of Delia Doer, against W. H. Smith, Jr., and others. Judgment for defendants, and plaintiff appeals. Reversed.

John A. Hutchinson and Miller & White, for appellant.

Merrick & Smith and Van Winkle & Ambler, for appellees.

DENT, J.—Hubert F. Dickel, committee of Delia Doer, appeals to this court from a decree of the circuit court of Wood county, rendered on the 23d day of February, 1894, in a chancery case therein pending, wherein said committee was plaintiff, and W. H. Smith, Jr., *et al.*, were defendants. This is the second appeal in this cause. See 38 W. Va. 635, 18 S. E. Rep. 721. On the former appeal the title of W. H. Smith, Jr., to the property in controversy was held to be void, and he to be trustee thereof for the benefit of the lunatic, Mrs. Doer; and the cause was remanded to be further proceeded in according to such opinion and the rules of law and equity. After the cause was remanded, the plaintiff proceeded by action of ejectment to oust the defendant Smith, and then, in the chancery suit, to compel

him to account for the rents and profits. The circuit court referred the matter to a commissioner, and on the coming in of his report entered the following decree, now here complained of, to wit: "And now, at this day, to wit, at a circuit court continued and held for Wood county, at the court-house thereof, on August 3, 1895, this cause came on again to be heard upon the bill and upon all former orders, decrees and proceedings, and upon all papers heretofore read herein, and upon the report of C. M. Enright, special commissioner, heretofore filed, and upon the exceptions of the defendant W. H. Smith, Jr., thereto, and upon a copy of the judgment in ejectment in the case of Hubert Dickel, committee aforesaid, against the said W. H. Smith, Jr., and M. L. and M. A. Jones, which is by agreement of the parties made a part of the record of this cause, and was argued by counsel, on consideration whereof the court is of opinion that the three several exceptions of the defendant W. H. Smith, Jr., except as hereinafter decreed, are not well taken. It is therefore ordered, adjudged and decreed that the said exceptions, and each of them, except in so far as herein decreed, be, and the same are, overruled. And the court doth find and doth adjudge, order and decree that the net annual value of the real estate in the will and proceedings mentioned from August 2, 1882, the date when the said W. H. Smith, Jr., obtained possession thereof, to the time when the improvements were made thereon by him, in June, 1888; was \$76, and that the net annual value thereof from the time said improvements were made, not taking into consideration the increased value resulting from said improvements, to March 10, 1890, the date of the death of the life tenant, Anton Doer, was \$76, and that the aggregate annual value from said 10th day of March, 1890, to the 3d day of March, 1894, the date of the judgment in ejectment aforesaid, including interest to this date, is the sum of \$354.04. The court being of the opinion, and doth now adjudge, order and decree that the said W. H. Smith,

Jr., is not liable to account to the said complainant for the increased annual value of said property resulting from the improvement made by said Smith, to wit, the sum of \$200 per annum, as found by said Commissioner Enright. The court doth further find and doth adjudge, order and decree that the value of the improvements or repairs made by the said W. H. Smith, Jr., in June, 1888, while he was occupying the said property as life tenant, was as of the date of the death of said Anton Doer the sum of \$1,248; and in consideration whereof the court is of the opinion, and doth further adjudge, order and decree, that the said W. H. Smith, Jr., is not liable to account to the said complainant for the annual value of said property at the rate of \$200 per annum, but is liable to account to him therefor at the rate of \$76 per annum, but that he is entitled to offset the value of said improvements against the said sum of \$354.04, the aggregate sum aforesaid; but the court is of the opinion, and doth adjudge, order and decree, that the said Smith is not entitled to be reimbursed, nor to have a decree against the complainant nor the estate of said Delia Doer, for the excess of said improvements over said aggregate sum of \$354.04." A large part of the decree is omitted as having nothing to do with the questions presented by this appeal.

The plaintiff relies on the following errors: "First. The court erred in decreeing that the defendant W. H. Smith, Jr., is not liable to account to your petitioner for the full net annual value of the property in the bill mentioned, to wit, \$200 per annum, since the 10th day of March, 1890, the date of the death of Anton Doer, the life tenant, to the date of the judgment in ejectment against said Smith, to wit, the 3d day of March, 1894, with interest. Second. The court erred in decreeing that the defendant Smith was only liable to account to your petitioner for the rents and profits at the rate of \$76 per annum, and not at the rate of \$200 per annum. Third. The court erred in decreeing that the said W. H. Smith, Jr., was entitled to set off against

the rents and profits of said property the value of the alleged improvements by him while he occupied said property as life tenant, which accrued to your petitioner after the death of Anton Doer, and after demand for the possession of the property by your petitioner, and after the suit in ejectment was brought against him." The defendant Smith assigns as error that he was not allowed, as against the property, the full amount of the improvements put thereon by him. The commissioner's report and the evidence returned therewith by reasons of the exceptions taken thereto show the facts to be as follows: That six years after Smith became the purchaser of the property at the commissioner's sale some time in the year 1888 he improved the property to the amount of \$1,300, and enhanced its value to that extent; that prior thereto the rents of the property amounting to about \$100 per annum were not more than sufficient to keep the property in repair, and pay the taxes thereon; that, after the improvements were made, the net rents of the property after the payment of taxes and repairs amounted to \$200; that he continued to hold the property until July 10, 1894, when he was ousted therefrom by the ejectment suit.

This court plainly indicated in its former decision that Smith, having purchased in good faith, under void decrees, he should be held to be a trustee of the property for the insane woman; and remanded the case, that the circuit court might treat him as such, and require him to account accordingly. He was not to be treated as a tort-feasor, a wrongdoer, or a trespasser against whom all the mere fictions of law were to be enforced, but justly and equitably, according to the actual facts and the truth as they should be established by the evidence. Such being the determination of the court, right or wrong, it is *res adjudicata*, so far as this case is concerned, and is no longer an open question and the counsel should have governed themselves in accordance therewith in the circuit court. It was the duty of the

chancery court, having taken jurisdiction, to have gone on to complete justice between the parties, and to have stayed all proceedings at law involving the question of the possession of the property, as the parties and the property were both subject to its jurisdiction and control. It was therefore wrong for the trustee, Smith, to be deprived of the possession of the property until it was done by order of the chancery court. But as he did not raise objection to the law proceedings, or ask to be restored to the possession of the property, he will be considered to have waived his rights in this respect.

The doctrine of courts of law as to improvements allowed in ejectment cases does not govern in this case ; but it is governed by equitable principles relating to the accounts and settlements of trustees. In the case of *Pratt v. Thornton*, 28 Me. 355, it was held that " a trustee cannot deduct the amount expended by him for additions and improvements on the trust estate to the prejudice of the *cestui que trust*." In the same case it is said : " It is the business of a court of equity to afford full protection to the *cestui que trust*, but not to punish the trustee for his ignorance or carelessness merely, further than is required for such protection." Also : " It must be, and always has been, the anxious wish of a court of chancery to save a trustee from harm while he is acting in good faith : " *Thompson v. Thompson*, 16 Wis. 91 ; 27 Am. & Eng. Enc. Law, 177, 178. A trustee cannot improve his *cestui que trust* out of the estate, nor can he ordinarily charge the corpus of real estate with improvements. But where he makes improvements in good faith, and he enhances thereby the value of the property, and increases the rents thereof, to the extent of such enhancement and increase, he should be reimbursed at least out of such increased rents. Defendant Smith in good faith, in the year 1888, placed improvements on the property in controversy to the amount of \$1,300, and the property was enhanced in value to that extent and the annual rents

increased thereby \$200. This did not prejudice the rights of the *cestui que trust*, but benefited her property to the full extent thereof. This is not controverted, but is an admitted fact. Without these improvements the property was and would have continued worthless, as the rents were only sufficient to keep up the repairs and pay the taxes thereon. The improvements should be paid for not out of the corpus of the property but out of the increased rents derived from and by reason of such improvements alone. But Mrs. Doer having to pay for these improvements in full, she is entitled to the increased rent occasioned thereby, not only from the expiration of the life tenancy, but from the date of the improvements. The life tenant, being her trustee or committee, cannot improve her property to increase the rents and then keep the increased rents, and make her pay for the improvements. It is regarded as loaning her estate the money the improvements cost, on which he is entitled to interest; but she is entitled to be credited thereon with the increased rents from the true date thereof. Such would have been the rule had these improvements been made by defendant Smith as her lawful committee, and the same must apply to him as a constructive trustee. The decree in this case is reversed, and this case is remanded to the circuit court, with directions to credit defendant Smith with said sum of \$1,300, the amount of the improvements put on the property by him as of the date thereof, and then to charge him with the increased rental of \$200 per annum from the same date, to wit, 1888, exact time not disclosed by evidence, allowing him interest on the annual balances up until he was ousted from the possession of the property, and thus ascertain the balance on such improvements still unpaid, and for this amount, together with the interest thereon, to give him a decree against the plaintiff, to be paid out of the rents of said property. The plaintiff, as appellant, will pay the costs of this appeal out of the funds in or to come into his hands belonging to his ward.

REIMBURSEMENT OF TRUSTEE FOR IMPROVEMENTS MADE BY HIM.

As a general rule, a trustee under an express trust will not be reimbursed for improvements made upon the trust estate, unless that power be clearly conferred by the instrument creating the trust, or the improvements be made with the assent of the *cestui que trust*: Dickinson v. Conniff, 65 Ala. 581; Pratt v. Thornton, 28 Me. 355; Cogswell v. Cogswell, 2 Edw. Ch. (N. Y.) 231; L'Amoureux v. Van Rensselaer, 1 Barb. Ch. (N. Y.) 34; Ames v. Downing, 1 Bradf. (N. Y.) 321; Wykoff v. Wykoff, 3 W. & S. (Pa.) 481; Williams v. Smith, 10 R. I. 280; not even when they are made in good faith, if they are not within the purview of the trust: Green v. Winter, 1 Johns. Ch. (N. Y.) 26; and *a fortiori*, if he retains possession of the land tortiously: Tatum v. McLellan, 56 Miss. 352. When a trustee had sold machinery belonging to a mill on the estate, and had the use thereof for several years, he was held debarred from claiming reimbursement for improvements made by him: Bradford v. Clayton, (Ky.) 39 S. W. Rep. 40. So, a guardian who erects buildings on his ward's land, without authority, will not be reimbursed: Payne v. Stone, 7 Sm. & M. (Miss.) 367; Haggerty v. McCanna, 25 N. J. Eq. 48; Putnam v. Ritchie, 6 Paige Ch. (N. Y.) 390; Bellinger v. Shafer, 2 Sandf. Ch. (N. Y.) 293; Hassard v. Rowe, 11 Barb. (N. Y.) 22. It would seem, however, that in case of a resulting or constructive trust, if the trustee improves in good faith, believing that his title is good, he may enforce a claim for improvements made while he remains in possession: Thompson v. Thompson, 16 Wis. 91; at least to the extent that the value of the lands is increased thereby: Pratt v. Thornton, 28 Me. 355; and a trustee who buys in the property of his *cestui que trust*, sold at sheriff's sale, without any instrumentality of his, though he cannot hold it as against the beneficiary, will be allowed compensation for his expenditures and improvements: Spindler v. Atkinson, 3 Md. 409.

A power to improve real estate given by will renders proper an order that the trustee shall be reimbursed out of the increase of profit: *In re Nesmith's Estate*, 140 N. Y. 609, affirming 24 N. Y. Suppl. 527; and authority to change the investment of

trust funds will justify the expenditure of part of the corpus of the trust estate in building on land owned by the estate: *Stevens v. Melcher*, (N. Y.) 46 N. E. Rep. 965, affirming 80 Hun, 514. So, if the improvements are made at the request or with the consent of the *cestui que trust*, he cannot object to the reimbursement of the trustee therefor. In *Gisborn v. Charter Oak Life Ins. Co.*, 142 U. S. 326, a mine was conveyed to a trustee to operate, and apply the profits to its expenses and the payment of certain debts, and then to reconvey to the defendant. After the trustee had mined some \$20,000 worth of ore, the vein, which had been yielding abundantly, suddenly failed, and the trustee incurred an indebtedness of \$52,000 in fruitless efforts to find it again. These efforts were all approved by the defendant, and it was held that under the terms of the declaration of trust, it was proper to charge these expenses upon the property, and that the defendant, having approved of the expenditures, could not complain. See *Gallagher v. Yosemite Min. & Mill. Co.*, 10 Utah, 189.

It is the duty of the trustee to make whatever repairs are necessary to preserve the trust property; and he will, therefore, be reimbursed for them: *Fontaine v. Pellet*, 1 Ves. Jr. 337; *Atty. Gen. v. Geary*, 3 Meriv. 513; *Bridge v. Brown*, 2 Y. & Coll. Ch. 181; *Gilliland v. Crawford*, 4 Ir. R. Eq. 35; *Woodard v. Wright*, 82 Cal. 202; *Mayfield v. Kilgour*, 31 Md. 240; *Parsons v. Winslow*, 16 Mass. 361; *Watts v. Howard*, 7 Metc. (Mass.) 478; *Sohier v. Eldredge*, 103 Mass. 345; *Kearney v. Kearney*, 17 N. J. Eq. 59; *Green v. Winter*, 1 Johns. Ch. (N. Y.) 26; *Odell's Estate*, 18 N. Y. S. R. 997; *Herbert v. Herbert*, 57 How. Pr. (N. Y.) 333; *Hepburn v. Hepburn*, 2 Bradf. (N. Y.) 74; *Randall v. Dusenbury*, 63 N. Y. 645; *Busse v. Schenck*, 12 Daly, (N. Y.) 12; *Downey v. Bullock*, 7 Ired. Eq. (N. C.) 102; *Cheatham v. Rowland*, 92 N. C. 340; *Mannix v. Purcell*, 46 Ohio St. 102; *Williams v. Smith*, 10 R. I. 280; *Greene v. Greene*, (R. I.) 35 Atl. Rep. 1042. Further, if the improvements are needful, and such as equity will sanction, they are chargeable on the trust estate, and will be allowed to the trustee in his accounts: *Little v. Little*, 161 Mass. 188; *Myers v. Myers*, 2 McCord Ch. (S. Car.) 214; and sometimes, if the *cestuis que trust* are minors, equity will compel them to elect, on coming of age,

whether to receive the increased rents and profits due to the improvements, charging the expense of those improvements on the trust property, or to refuse to pay for the improvements and receive such rents and profits as the estate would produce without the improvements: *Root v. Yeomans*, 15 Pick. (Mass.) 488; *M. E. Church v. Jaques*, 1 Johns. Ch. (N. Y.) 450; *Noyes v. Blakeman*, 6 N. Y. 567; *Field v. Wilbur*, 49 Vt. 157.

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